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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. .....

JOS. SCHLITZ BREWING COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA

and

GENERAL BREWING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

This is a direct appeal from the final judgment of the United States District Court for the Northern District of California, Southern Division, which was entered on March 28, 1966, adjudging violations of Section 7 of the Clayton Act, as amended, and ordering divestiture. This Statement will show that the Court has jurisdiction of the appeal and that the questions presented are unlike any considered in prior decisions of this Court and are important to the administration of Section 7 in the public interest. The questions not only require plenary consideration, but unless probable jurisdiction is noted, Schlitz will be "deprived of any appellate review" of an extremely harsh decree entered by a single district judge. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 (1963).

Opinion Below

The opinion of the district court (reprinted *infra*, pp. 1a-49a, appendices A-F omitted) is reported at 253 F. Supp. 129 and 1966 CCH Trade Cas. ¶ 71,725 (appendices A-G omitted).

Jurisdiction

The United States filed a civil action on February 19, 1964, in the District Court for the Northern District of California, Southern Division, alleging violations of Section 7 of the Clayton Act, as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964). The final judgment of the district court adjudging appellant to have violated the statute as charged and ordering divestiture was entered on March 28, 1966, and notice of appeal was filed in that court on April 27, 1966. The district court granted appellant until August 26, 1966, to docket the case and file the record here.

The jurisdiction of this Court to review the final judgment of the district court by direct appeal is conferred by Section 2 of the Expediting Act, as amended, 62 Stat. 989 (1948), 15 U.S.C. § 29 (1964), 49 U.S.C. § 45 (1964). *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 304-11 (1962).

Statute Involved

Section 7 of the Clayton Act, as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Questions Presented

Jos. Schlitz Brewing Company, an American brewer, purchased a controlling stock interest in John Labatt Limited, a Canadian brewer, solely to enter the Canadian beer market. Schlitz purchased stock in an existing Canadian brewer because it could not otherwise practicably enter the Canadian market, which is dominated by three companies and is sheltered from outside competition by local laws and practices. Sales of Labatt beer and ale in the United States have been and are insignificant.

At the time of the stock purchase, Labatt controlled General Brewing Corporation, a western United States brewer. Schlitz wanted no part of General Brewing from the outset of the transaction. It had tried unsuccessfully to resolve Labatt's interest in General Brewing before purchasing any Labatt shares. It was prevented from bringing about a sale of that interest after purchasing the Labatt shares by a restraining order, which the district court, at the government's insistence, refused to modify so that the Labatt interest in General Brewing could be sold. Under Labatt's aegis and long before Schlitz purchased the Labatt shares, General Brewing, once the foremost brewer in California, had become a failing, profitless company.

Accordingly, the first question presented by this appeal is:

(1) Whether it was not entirely proper under Section 7 of the Clayton Act, as amended, for Schlitz to enter the Canadian beer market, from which American brewers are otherwise foreclosed, by purchasing a controlling stock interest in Labatt, provided Schlitz caused Labatt to dispose of its interest in General Brewing.

Questions subsidiary to this question are:

(2) Whether Schlitz should not have been afforded the opportunity, through pro tanto suspension of the temporary restraining order, to explore the sale by Labatt of its interest in General Brewing;

(3) Whether, in all events, divestiture by Schlitz of the Labatt shares should be required only if Labatt retains its interest in General Brewing and then only if General Brewing continues in the brewing business.

Additional questions presented are:

(4) Whether the district court correctly ruled that the earlier purchase by Schlitz, then a struggling seller of premium beer in California, of the assets of Burgermeister Brewing Corporation, a rapidly declining brewer of popular priced beer in California, may adversely affect competition in the production and sale of beer, notwithstanding: (a) the decision by the Antitrust Division in 1961 not to file suit to enjoin the purchase, (b) the filing of suit to set aside the purchase more than two years later and only after Schlitz had purchased the Labatt shares in 1964, (c) the presentation by the government at trial in 1965 of virtually the same evidence Schlitz furnished the Antitrust Division in 1961, and (d) uncontroverted additional evidence showing no adverse effect on competition in the sections of the country or geographic markets found by the court;

(5) Whether the right of Schlitz to a fair trial was infringed by (a) the district court's denial of Schlitz's requests for pre-trial discovery during the interval between the setting of the trial date and the start of trial and (b) the court's refusal to reopen the record to receive new evidence when General Brewing, after trial but before decision, sold one-third of its brewing capacity to Miller Brewing Company, notwithstanding the government's in-

sistence throughout that General Brewing be kept intact and that Schlitz not be allowed to bring about a sale of Labatt's interest in General Brewing;

(6) Whether the district court's findings of fact and conclusions of law satisfy the requirements of Rule 52 of the Federal Rules of Civil Procedure and the trial court's obligation to the reviewing court and the parties to set forth adequately the reasons for its decision.

Statement

The Government's Complaint

In February 1964, Schlitz purchased a controlling stock interest in John Labatt Limited, a Canadian brewer. At that time, Labatt controlled General Brewing Corporation, a regional brewer marketing in several western states. The indirect interest that Schlitz would have had in General Brewing through ownership of the Labatt shares was to become the center of controversy—notwithstanding Schlitz's purchase of the Labatt shares solely to enter the Canadian beer market, not to acquire an interest in General Brewing, and its repeated offers to extinguish any such interest by having Labatt sell its holdings in General Brewing.

Previously, on December 30, 1961—after the Antitrust Division had investigated the proposed transaction and decided not to oppose it—Schlitz had purchased the assets of Burgermeister Brewing Corporation, a regional brewer marketing in several western states.

The government's complaint, filed on February 19, 1964, charged that Schlitz's purchase of the Labatt shares and the Burgermeister assets violated Section 7 of the Clayton Act, as amended, because the effect of each purchase might be substantially to lessen competition or to tend to create a monopoly in the production and sale of beer in the United

States and three geographic submarkets. It sought divestiture of the Labatt shares and the Burgermeister assets. Schlitz denied the substantive allegations of the complaint, while its co-defendant, General Brewing, admitted the substantive allegations insofar as Schlitz was concerned. General Brewing, undoubtedly at the behest of Labatt's management, which opposed Schlitz's entry into Canada, assisted the government in prosecuting the case.

Schlitz's Purchase Of The Labatt Shares

Schlitz purchased 39.3 per cent of the outstanding common stock of Labatt, third largest of the Canadian brewers with total sales of 2,370,000 barrels in fiscal 1964-65.*

Schlitz and other American brewers have been trying to enter the Canadian beer market for many years, but they have not been able to overcome the barriers placed in the way of such entry. Tariffs and taxes collected by the national and provincial governments on beer imported into Canada are prohibitive. Although Canada is the nearest foreign market for many American brewers, only 1,261 barrels of American beer have been exported to Canada since 1950 and not a single barrel since 1958.

Legal and practical considerations similarly prevent American brewers from independently brewing beer in Canada for sale there. If an American brewer managed

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* Very small amounts of beer and ale brewed by Labatt in Canada, approximately 39,000 barrels in 1963, are sold to American importers for resale in the United States. The sales are substantially confined to areas, such as Buffalo, New York, and Detroit, Michigan, where advertising originated in the United States and ostensibly intended to reach American consumers is actually aimed at beer drinkers in Canada. Such advertising by Labatt would probably be illegal if originated in Canada.

to obtain the necessary licenses, restrictions on pricing, marketing, advertising, and selling practices would place it at an insurmountable disadvantage vis-a-vis entrenched Canadian brewers.

In short, the only feasible way for Schlitz or any other American brewer to enter the Canadian market is by purchasing an existing Canadian brewer. Aside from Labatt, there are only two other Canadian brewers which could afford meaningful entry into Canada. Neither one has been for sale, and both had and still have substantial interests in American brewers. Other Canadian brewers are so small and operate in so few provinces that their purchase would be uneconomic for an American brewer trying to enter Canada.

Consequently, when Schlitz learned in 1963 that members of the Labatt family were interested in selling their stockholdings in the Labatt company, it pursued the matter and eventually purchased the shares at issue here.

Labatt unfortunately controlled General Brewing. Schlitz tried to resolve Labatt's holdings in General Brewing before it purchased any Labatt shares. Failing this, Schlitz decided to solve the problem after it acquired a voice in Labatt's management and has since repeatedly offered to vote its shares to bring about a sale of Labatt's holdings in General Brewing. It would have done so but for entry of a temporary restraining order by the district court. (*infra*, p. 18a)

The Temporary Restraining Order

On the same day the complaint was filed, the district court entered an ex parte order, which, among other things,

enjoined Schlitz from "exercising any dominion or control over stock of John Labatt, Ltd., already acquired."*

During and after the trial Schlitz repeatedly asked the district court to suspend the restraining order so that the principals of Schlitz, General Brewing, and Labatt could, subject to court approval, negotiate a resolution of some of the problems generated by the lawsuit, including the possible sale of Labatt's holdings in General Brewing. Schlitz had been warned by the court and the government that such negotiations would otherwise constitute a violation of the order, unless their purpose was to arrange a sale of Schlitz's Labatt shares. The government opposed suspension of the order precisely because it feared Schlitz would influence Labatt to dispose of its holdings in General Brewing and thereby remove the only objection the government had to Schlitz's control of Labatt.

The district court denied each motion made by Schlitz. As a result, the restraining order was in effect from the filing of the complaint until the entry of judgment, a period of more than two years. During that time, when 39.3 per cent of Labatt's outstanding common stock was in limbo and its management was not accountable to a true majority of the company's stockholders, it appears that Labatt was reorganized into a holding company, brewing operations were transferred to a subsidiary, valuable real estate was sold, acquisitions of non-brewing properties were made, and joint ventures with European brewers were undertaken—one of which made General Brewing the beneficiary of an illicit division of world beer markets.

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* The order was thereafter extended from time to time with the consent of the parties pending the filing of the government's application for a preliminary injunction. The government filed its application approximately one year later, but no order was entered granting or denying it.

The Issue Respecting The Labatt Shares

Having stymied Schlitz's efforts to renounce the indirect interest it otherwise would have in General Brewing by reason of its holdings in Labatt, the government focused its legal attack exclusively on the competitive implications of that interest. Oblivious to its bootstrapping, the government never claimed that Schlitz's holdings in Labatt would offend Section 7 absent Labatt's control of General Brewing. This is understandable because there is no part of the United States in which Schlitz and Labatt have been, are now, or are potentially substantial competitors. At most, sales of Labatt products in the United States would add four-hundredths of one per cent to Schlitz's share of total national beer sales. Although several witnesses testified that Schlitz control of General Brewing could impair competition in the brewing industry, *not one believed that Schlitz control of Labatt standing alone posed any such threat.* Indeed, after hearing the government's case-in-chief, the district court itself declared: "If Labatt had had no interest in General Brewing, the Court is of the tentative view that Labatt's participation in the American market is and has been so insignificant that it would not preclude Schlitz from acquiring Labatt . . . . I am inclined, the more I think about it, I am inclined to so view the matter." (Tr. 889)

Nevertheless, the government theorized that Labatt control of General Brewing promised to enhance competition and, on that theory, rejected as a basis for decision or settlement of the case Schlitz's willingness to divest itself of the Labatt shares if Labatt retained control of General Brewing. But conflicts between theory and reality belied the government's position. In the course of the Labatt-General Brewing relationship, General Brewing had been transformed from a leading competitor in the West to a failing, profitless company.

Between 1949 and 1958, General Brewing was the foremost brewer in California and was a substantial factor in other western states. In 1958, General Brewing's peak year, Labatt acquired its initial interest in the company and by 1964 controlled approximately 64 per cent of General Brewing's outstanding common stock. 1958 also marked the onset of General Brewing's collapse as a viable brewer. Its sales dropped from 2,265,000 barrels in 1958 to 1,751,000 barrels in 1964 or more than 22.5 per cent. Over the same period, its profits plunged from approximately $3,900,000 in 1958 to a net loss exceeding $827,000 in 1964. At trial, a loss of $1,000,000 was projected for 1965; it actually exceeded $2,300,000.*

Significantly, General Brewing's decline occurred at a time when total beer sales in California, where approximately 60 per cent of its sales were made, increased more than 31 per cent and when total beer sales in the United States increased more than 11 per cent.**

In the face of these facts and Labatt's trial admission that it was not prepared to assist General Brewing financially, the government persisted in arguing that General Brewing had benefited from Labatt's control. It even claimed that General Brewing was about to embark on an expansion program under Labatt's guiding hand, which would make it a national brewer and thereby increase competition in the brewing industry. According to the government, this expansion was to be accomplished by merger and acquisition. Strangely, the government helped thwart the purchase of General Brewing from Labatt by Heileman Brewing Company, a small, aggressive Middle Western

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* As its sales and profits dwindled, General Brewing paid to Labatt at least $300,000 in consulting fees and to Labatt or Labatt controlled companies dividends exceeding $5,000,000.

** The national increase is through 1963.

brewer. The uniting of General Brewing and a brewer such as Heileman would have given the government what it professed it wanted.

After trial but before the district court had announced its decision, General Brewing agreed to sell its Azusa, California, brewery to Miller Brewing Company. The brewery, representing approximately 34 per cent of General Brewing's total capacity, served an area where General Brewing made the largest part of its sales. General Brewing and Miller advised the government of the sale, which was to be timed so that it would not take place until after the district court would have rendered its decision. No one thought it advisable to inform either the court or Schlitz of this development, even though the integrity of General Brewing as a viable competitor was essential to the government's theory of the case.

Schlitz fortuitously learned of the sale and promptly asked the district court to reopen the record so that evidence respecting the sale and its implications could be presented *before* the court rendered its decision. The sale clearly appeared to eviscerate the government's entire case. For it not only reduced General Brewing's actual and potential market shares, but signally demonstrated Labatt's inability to reverse General Brewing's precipitous decline and mocked any claim that General Brewing was Labatt's vehicle for creation of a national brewer. (cf. *infra*, p. 3a)

In spite of Schlitz's warnings to the contrary, the district court was led to believe that the proceeds of the sale, approximately $8 million, would be available to General Brewing for rehabilitation and possible expansion eastward. Officers of General Brewing admitted, however, in the course of discovery *in another lawsuit*, that the proceeds would be used to pay off an outstanding debt.*

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* Although Schlitz so advised the district court, the court made a contrary finding in its decision on the merits. (*infra*, p. 3a)

The district court denied the motion to reopen, stating that it would not interfere with "an exercise of General Brewing's independent business judgment" and that it believed the sale was a step forward, as General Brewing had represented it to be. (*infra*, p. 3a) Schlitz had not asked that the sale be enjoined or interfered with in any way, only that evidence respecting it be taken under oath with opportunity for cross-examination.

* * *

In its decision on the merits, the district court acknowledged that Labatt itself was not a significant factor in the American brewing industry. (*infra*, p. 36a) Accepting the government's theory of the case, however, it found the acquisition unlawful solely because of Labatt's control of General Brewing.* (*infra*, pp. 14a-16a, 27a) Complete and unconditional divestiture of the Labatt shares was ordered. (*infra*, pp. 47a-48a)

The Acquisition Of Burgermeister's Assets

Responding to the Antitrust Division's request of September 1961 for information that would be "helpful in evaluating" its contemplated purchase of the Burgermeister assets, Schlitz submitted materials revealing the terms of the transaction, the volume of sales and share of sales of the

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* Registering demonstrably false doubts, the court below questioned whether Schlitz had purchased the Labatt shares solely to enter Canada and whether it "could have gone a great deal further in making sale of General Brewing a prerequisite for its purchase of Labatt stock." (*infra*, pp. 27a n. 2, 38a) It is indisputable that Schlitz was not out to capture control of General Brewing and had tried to negotiate General Brewing's sale by Labatt. Even the president and executive vice-president of Labatt, who had participated in the negotiations and were admittedly opposed to Schlitz's purchase of the Labatt shares, so testified. Above all, Schlitz time and again offered to divest itself of the Labatt shares if it could not effect a sale of Labatt's holdings in General Brewing.

two companies and their competitors, and the wholesaler alignments of the two companies. (*infra*, pp. 19a-20a)

Among other things, this material apprised the Antitrust Division that Burgermeister operated one brewery, located in San Francisco. It produced one brand of beer, Burgermeister, which was sold at popular prices. Approximately 90 per cent of Burgermeister's sales were made in California, the remaining 10 per cent in nine other western states.

Burgermeister recorded its highest volume of sales in 1955 when it ranked second in California with 16.12 per cent of total sales and had 1.3 per cent of total sales nationally. Its sales and share of sales dropped measurably in subsequent years. While total industry sales nationally *increased 4.8 per cent* from 84,977,274 barrels in 1955 to 89,028,431 barrels in 1961 (the year preceding the acquisition), Burgermeister's total sales *dropped 32.16 per cent* from 1,071,003 to 726,533 barrels. For the same period, total industry sales in California, where Burgermeister sold 90 per cent of its beer, *increased 27.23 per cent* from 6,065,044 to 7,716,565 barrels, while Burgermeister's California sales *dropped 33.11 per cent* from 977,561 to 653,898 barrels. Burgermeister's share of California sales had fallen to 8.5 per cent by 1961, down from 16.12 per cent in 1955.

Burgermeister's net income began deteriorating before its sales volume did. Net income fell from $2,053,000 in 1952 to $944,687 in 1959, to $720,951 in 1960, to $408,602 in 1961—a drop of more than 80 per cent in ten years.

In 1955, out of total sales of 5,780,000 barrels, Schlitz sold 243,190 barrels in California and had 4.01 per cent of total California sales. By 1961, its share of California sales had fallen to 3.6 per cent on slightly increased sales of 283,278 barrels.

Conferences were held with the Antitrust Division after the materials had been submitted, and the closing was put off for several months until the matter appeared resolved. The then head of the Antitrust Division testified at trial by way of stipulation that, while he did not specifically recall in 1965, he may have stated to Schlitz in 1961 that he was not prepared to take any action. It is a matter of record that no steps were taken to forestall the transaction. (*infra*, pp. 19a-20a)

Having submitted the information requested by the Antitrust Division to enable it to evaluate the transaction, having conferred with representatives of the Division over a period of several months, and no adverse action having been taken, Schlitz completed the purchase on December 30, 1961. More than two years later, when it filed an action to enjoin Schlitz's purchase of the Labatt shares, the government sought for the first time to set aside the acquisition of Burgermeister's assets.

At the filing of the complaint, post-acquisition data showed that Schlitz had tried to check Burgermeister's decline as a viable brand. It invested $4 million in Burgermeister's plant and facilities, improved the Burgermeister formula, designed new labels and packaging, developed new marketing programs, and took steps to achieve better distribution at the wholesaler level. For its efforts, Schlitz lost money on the brand in the first two years after the acquisition.

Furthermore, a comparison of combined Schlitz/Burgermeister sales for the three years preceding the acquisition with their combined sales for the first three years following the acquisition reflected no adverse effect on market shares. Their combined sales in California actually *fell 1.3 per cent* from 1,179,665 barrels in 1959 to 1,036,762 barrels in 1964, whereas for the same period total California sales of all

brewers *increased more than 23 per cent* from 7,433,511 to 9,152,908 barrels. Although their combined sales volume was off only 1.3 per cent, their combined percentage of total California sales dropped from 15.9 per cent in 1959 to 11.3 per cent in 1964. Nationally, their combined share of total sales increased .5 per cent from 7.8 in 1959 to 8.3 in 1963, and as the court below was to find, the "evidence was not sufficient to establish . . . a substantial lessening of competition, actual or potential, . . . in the United States." (*infra*, p. 26a)

Except for post-acquisition data, the basic facts available to the Antitrust Division in 1961 were adduced in support of the complaint's allegations. The government nevertheless objected to the introduction of any evidence respecting its decision not to file suit in 1961 and took issue with Schlitz's contention that the Antitrust Division had issued what amounted to an informal clearance of the acquisition. It called a former assistant attorney general in charge of the Antitrust Division to testify that merger clearances are granted only in response to written requests, that Schlitz had not submitted such a request, and that there is no such thing as an informal or oral clearance (*infra*, p. 20a)—all despite the public statement by the current head of the Antitrust Division that there are indeed informal or oral indications by the Antitrust Division as to whether or not it will move to enjoin a proposed acquisition, which is precisely what would have been said in a formal clearance letter. 30 A.B.A. Section of Antitrust Law 100, 120-21 (1966).

In all events, the government had more than three and one-half years after the acquisition and before trial to detect any anticompetitive manifestations resulting from the purchase of Burgermeister's assets by Schlitz. Post-acquisition market shares provided no such evidence, and

not one disinterested witness would testify that competition had been injured or was threatened in any way by the acquisition. To the contrary, several thought competition had been enhanced.

Before, during, and after the trial, the district court suggested that the case be settled by allowing Schlitz to retain the Burgermeister assets if it disposed of the Labatt shares. The court stated its belief that the government would not have tried to undo the acquisition of Burgermeister if Schlitz had not subsequently purchased the Labatt shares. Accepted by the government, the proposal was rejected by Schlitz because of the Antitrust Division's decision in 1961 not to challenge the Burgermeister acquisition and Schlitz's unwillingness to be forced into abandoning entry into Canada, which it believed Section 7 was never intended to reach.

* * *

In holding Schlitz's acquisition of the Burgermeister assets to be unlawful, the district court cited concentration trends in the brewing industry, the combined market share of Schlitz and Burgermeister,* and several wholesaler realignments made after the acquisition.** (*infra*, pp. 23a-

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* As to both the Burgermeister and Labatt acquisitions, the court portrayed as decisively significant the combined Schlitz/Burgermeister/General Brewing market shares. (*infra*, pp. 14a-16a, 27a) On the facts of this case, however, there was no such market share to consider and the court's findings in this connection are simply beside the point. Schlitz wanted no part of General Brewing, and if Labatt did not dispose of its holdings in General Brewing, Schlitz was prepared to divest itself of the Labatt shares.

** The Azusa brewery purchased by Miller from General Brewing is one-fifth again as large as the Burgermeister brewery purchased by Schlitz. Significantly, it will enable Miller to increase sales substantially, especially in California where its share could equal the Schlitz/Burgermeister share held to be unlawful.

27a) It dismissed as meaningless the Antitrust Division's investigation of the acquisition in 1961 and disregarded without explanation affirmative testimony that the acquisition had not impaired and did not threaten to impair competition. (*infra*, pp. 20a, 30a-31a) Casting aside stipulated facts and publicly reported sales figures, it made the astounding finding that Burgermeister was not a declining brewer. (*infra*, p. 21a) It even intimated that several wholesaler realignments made after the acquisition were "examples" of other anticompetitive effects of record, when the evidence was exactly to the contrary. (*infra*, p. 24a)

The court ordered complete and unconditional divestiture of the Burgermeister assets. (*infra*, p. 46a) Also, future brewery acquisitions by Schlitz in California were permanently enjoined, while acquisitions elsewhere in the United States were enjoined for ten years unless the government consents. (*infra*, p. 45a) Finally, introduction by Schlitz of its Old Milwaukee brand in states where Burgermeister is being sold was, in effect, banned until six months after sale of the Burgermeister assets. (*infra*, p. 47a)

The Procedures Below

Eight months after the complaint had been filed and before any discovery had taken place, except through several sets of written interrogatories and the production of documents by Schlitz,* the government filed a memorandum to set for trial under local rule 2(a). This rule provides in substance that all discovery must be completed within the next 30 days unless additional time is granted by the court. Additional time was granted upon the motions of Schlitz. Then, on May 19, 1965, the district court pro-

* During this time efforts to negotiate a settlement were underway on the basis of Schlitz's proposal that Labatt dispose of its interest in General Brewing.

posed going to trial on June 14, less than four weeks away. Schlitz advised the court that it was not prepared for trial, and on June 1, 1965, after hearing extensive argument, the court set August 16, 1965, as the trial date. After this date had been set, approximately two and one-half months remained before the trial was actually to start.

In the meantime, the parties had exchanged witness lists. On June 22, 1965, Schlitz sought the court's leave to depose *before* the scheduled trial date a limited number of the persons identified by the government and General Brewing as the witnesses they intended to call at trial, who had refused to be interviewed by Schlitz counsel. The court was advised that the government had refused to furnish Schlitz copies of documents made available to it by General Brewing and Labatt and that General Brewing had refused to allow Schiltz to interview *any* of its officers, directors, or employees, and had refused to furnish Schlitz copies of documents made available by it to the government. The district court nonetheless denied Schlitz's motions, stating that discovery would be allowed only if all parties consented. The government and General Brewing refused to consent.

Because the government maintained that the Labatt-General Brewing nexus was a beneficial one and should be perpetuated, Schlitz filed a motion on June 23, 1965, requesting the production of certain documents by General Brewing. By this motion, Schlitz sought to discover evidence bearing on the Labatt-General Brewing relationship as well as the reasons for General Brewing's decline. Except for non-controversial items that General Brewing agreed to produce, the motion was denied by the district court. Subsequent attempts to obtain the documents by subpoenas duces tecum during the trial were also unavailing.

In sum, Schlitz was denied the opportunity to depose hostile witnesses scheduled to testify against it and was also

denied access to documents required for its defense. If discovery had been allowed, Schlitz could have uncovered Labatt's true plans for General Brewing—among other things the sale of the Azusa brewery—and presented evidence on a critical issue in the case.

The trial started on August 16, and after almost four weeks of testimony, proposed findings of fact, conclusions of law, and supporting briefs were filed by the parties. Although Labatt was not a party to the action, the district court invited it to file its views. Labatt accepted the invitation and filed a brief controverting Schlitz's post-trial submission.

On March 24, 1966, the district court filed its decision. (*infra*, p. 41a) The court adopted the government's proposed findings of fact and conclusions of law virtually intact and decided every issue against Schlitz or, where it did not do so, declined to make any findings or rulings at all. (*infra*, pp. 1a-41a) Judgment was entered on March 28, 1966. (*infra*, pp. 43a-49a)

The Questions Are Substantial

I.

Section 7 Of The Clayton Act Does Not Forbid Acquisition Of Foreign Corporations, Especially Where Entry Into A Foreign Market Is Otherwise Foreclosed, And Assuming A Schlitz Interest In General Brewing Would Offend The Statute, Unconditional Divestiture Of The Labatt Shares Is Not Appropriate Relief.

On the one hand, the district court found that Labatt was not a significant competitive factor in the American brewing industry. On the other hand, the court concluded, precisely as the government had urged, that the indirect interest Schlitz would have in General Brewing through ownership of the Labatt shares violated Section 7 of the

Clayton Act. Accepting both findings, *unconditional* divestiture of Schlitz's Labatt shares is not warranted, let alone required, to restore any possible competitive impairment resulting from the acquisition.

But instead of ordering *conditional* divestiture of the Labatt shares, as would have been entirely appropriate under the government's own theory of the case, the court decreed *unconditional* divestiture and thereby effectively barred Schlitz from entering the Canadian beer market—irrespective of whether Labatt continues to control General Brewing or whether General Brewing continues in business as a brewer.

The critical question, therefore, is whether Schlitz should be allowed to retain its clearly lawful control of Labatt on the condition that Labatt dispose of its holdings in General Brewing. Such a disposition of the case would cancel any concern over the acquisition's legality under Section 7 because it would remove the only aspect of the transaction challenged by the government and held unlawful by the district court.

The sledgehammer decree entered below is plainly punitive and subordinates the paramount public interest in a competitive economy to the private advantage of foreign corporations, which are traditionally allergic to competition domestic firms must face and which exploit local laws whenever possible to lock out American competition. Indeed, the court below did not exhibit any awareness of the paradox of its decision. Labatt can freely acquire American brewers under the banner of promoting competition, but American firms have no reciprocal rights in Canada. Until Schlitz purchased the Labatt shares, no American brewer had been able to penetrate the closed Canadian brewing industry. The court's perverse decree would perpetuate that condition.

In view of the increasing investment by American business in foreign countries, the issue is one of public importance, particularly because of the inadequate decision below which unsettles prior understandings of the Act's coverage without disclosing the rationale for decision. Moreover, as this Court declared in *International Boxing Club* v. *United States*, 358 U. S. 242, 253 (1959): "The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court." See also *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89 (1950).

II.

Antitrust Division Clearance Of Schlitz's Acquisition Of Burgermeister Was Entitled To Evidentiary Consideration, And In All Events, Schlitz's Acquisition Of This Declining Brewer Did Not Give Rise To Proscribed Competitive Effects.

Because Section 7's outer perimeter is still being surveyed by the courts, businessmen understandably seek some indication of the Antitrust Division's attitude towards a contemplated merger. This course can be especially prudent in view of the statute's backward sweep, which can force the disruptive undoing of transactions completed years ago. Cf. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961). The district court's decision in the case at bar seriously impairs orderly conduct of business affairs by placing acquisitions initially evaluated by the Antitrust Division as to their legality under Section 7 in jeopardy of repudiation many years later without any showing of justification or change in circumstances.

Thus, the court below fundamentally misconceived the significance of the Antitrust Division's evaluation of the Burgermeister acquisition in 1961. For the court not only dismissed that fact as being entitled to no consideration at

all, but sanctioned the upsetting of an acquisition on the very evidence not deemed adequate to warrant action before the acquisition was consummated. If the district court is right, investigatory and clearance procedures are porous assurances indeed, creating only the illusion that business affairs can be conducted free of the perpetual threat of legal challenge. Congress certainly did not intend that Section 7 wreak such havoc.

Nor did the court below consider the adverse impact of divestiture on Schlitz in light of the Antitrust Division's decision not to challenge the acquisition almost five years ago. It failed to recognize that, because of Schlitz's reliance on the clearance and because of substantially changed conditions in the brewing industry, divestiture today would severely disable Schlitz in the market place and confer an unfair advantage on its competitors.

Lest there be any misunderstanding, we do not suggest that the Antitrust Division's decision not to sue constitutes any sort of estoppel against the government.* Section 7 embodies too important a national policy to allow forfeiture of the public interest. We do maintain, however, that a pre-merger clearance of the kind present here is entitled to evidentiary consideration in the event the government subsequently files suit and that some justification or change in circumstances should appear from the record if the evidence adduced in support of the complaint is the same information the Antitrust Division had before it at the outset.

The significance of such clearances is an important issue respecting the administration of Section 7 and merits plenary review by this Court. The decision below can only

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* Cf. *United States* v. *New Orleans Chapter, Ass'd Gen. Contractors*, 382 U.S. 17 (1965).

undermine public confidence in the fairness and rationality of antitrust enforcement, which in the end is indispensable to meaningful compliance with the law in the public interest.

These considerations are especially appropriate here since no decision prior to *Von's** and *Pabst*** hinted that a resulting national market share of 8 per cent or a resulting submarket share of 11 per cent was presumptively unlawful—even in an industry of declining numbers. And no decision to date impugns such market shares where the acquired company was a sharply declining market factor. As was evident to the Antitrust Division in 1961, Schlitz's purchase of the Burgermeister assets was not a "case of two already powerful companies merging in a way which makes them even more powerful than they were before." *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 278 (1966).*** Not only was Burgermeister declining absolutely as well as relatively at the time of the acquisition, but, according to the government, even Schlitz was a "struggling" competitor in California. (Post-Trial Br. p. 79)

Post-acquisition data confirmed the wisdom of the Antitrust Division's 1961 assessment. Notwithstanding its efforts after the acquisition, Schlitz could do no more than stabilize Burgermeister's sales and only at substantial cost. If Schlitz had truly derived any competitive advantage from the acquisition or if Burgermeister had been a viable brand, the situation doubtless would have been far different. However broadly Section 7 may be interpreted in cases where one thriving business unit acquires a thriving competitor, there is no basis, statutory or economic, for condemning

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* *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966).

** *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966).

*** *Pabst* was remanded to the district court so that Pabst could adduce evidence respecting, among other things, its vitality as a brewer at the time of the acquisition.

the acquisition at bar. In all events, this case raises an important issue respecting the administration of the Act and the need for a precedent governing future decisions and providing necessary legal guidance.

III.

The Trial Court's Foreclosure Of Pre-Trial Discovery By Schlitz And Subsequent Refusal To Reopen The Record To Receive Important Post-Trial Evidence Constituted Denial Of A Fair Trial.

To begin with, the unparalleled restraining order not only put the Labatt shares in limbo, but placed Schlitz at such a disadvantage that its trial preparation was severely handicapped. Hiding behind the order, the managements of Labatt and General Brewing were free to take action prejudicial to Schlitz and to assist the government in the preparation and presentation of its case. The government also used the order to guard the key element of its case against Schlitz's purchase of the Labatt shares by making it impossible for Schlitz to bring about a sale of Labatt's holdings in General Brewing. Such a sale would have eliminated any conceivable objection to the stock purchase and would have cut General Brewing loose from a debilitating influence, allowing it to become once again a significant factor in the brewing industry.

Equally destructive of Schlitz's rights was the trial court's refusal to allow Schlitz to take any depositions between the time a trial date had been set and the trial was actually to start. As detailed above, Schlitz had been furnished lists by the government and General Brewing, specifying the witnesses they intended to call at trial. The prospective witnesses who were connected with Labatt and/or General Brewing were hostile to Schlitz and refused to be interviewed by Schlitz counsel. Without any possible justification, the trial court ruled that the depositions of

these witnesses could be taken by Schlitz only if the government and General Brewing consented.

In opposing Schlitz's retention of the Labatt shares on the condition that Labatt sever its interest in General Brewing, the government insisted that "General Brewing needs the support of a company such as Labatt in order to accomplish its own plans to become a national brewer." (Post-Trial Br. p. 48) Yet when Schlitz sought discovery of documents bearing on this relationship and particularly documents revealing the reasons for General Brewing's decline under Labatt control, the trial court denied Schlitz access to the documents on the ground that it did not wish to interfere with the "independent business judgment" of General Brewing.

Most revealing in this connection is the trial court's refusal to hear evidence relating to the sale of General Brewing's Azusa brewery to Miller. Plainly, this evidence could have been presented in short order and need not have significantly delayed decision in the case. The court's ruling is especially incomprehensible since, although the case had been under submission for more than two months when the issue of the sale was first raised, the decision on the merits was not filed until more than a month later.

Neither the trial court nor the government should have an interest in interposing obstacles to the discovery and presentation of material evidence, unless they want a result not consonant with the true facts and equities of the case. It is highly irregular to resolve an important and contested matter by accepting the unsupported allegations of one of the parties, whose antagonism to the other party is a matter of record and whose motives are suspect. The Azusa sale cut across the heart of the government's entire case, which alone required reopening of the record to afford Schlitz the opportunity to present evidence and cross-examine wit-

nesses, but the court simply adopted without any hearing General Brewing's proffered representations concerning the reasons for and the consequences of the sale.

IV.

The Trial Court's Findings Of Fact And Conclusions Of Law Are Fundamentally Defective.

Apart from their substantive defects, the findings of fact and conclusions of law entered below were not prepared by the district court and do not reflect the legal reasoning believed to support the ultimate conclusion that Schlitz violated Section 7.

Rule 52 of the Federal Rules of Civil Procedure and the decisions of this Court admonish that findings should be the "product of the workings of the district judge's mind" and that conclusions should "reveal the discerning line for decision of the basic issue in the case." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964). The requirements exist not only to facilitate the reviewing function of the appellate court, but also to insure careful and disinterested consideration by the trial court in the finding of facts from which its legal conclusions are drawn.

Paying lip service to the "bench marks" of *El Paso*, the court below annexed to its findings and conclusions three and one-half introductory pages and some comments on the proposed findings submitted by Schlitz. But these additions cannot obscure the fact that the findings and conclusions actually entered were not the product of the district judge. Significant too in this connection is the court's failure to make any findings at all in areas where the finding unavoidably would have been favorable to Schlitz.

In short, the decision below is less adjudication than fiat. The decision in this sharply contested proceeding, which

filled more than 2,000 pages of transcript covering 31 witnesses and more than 170 exhibits, is so devoid of any explication of the legal conclusions reached and the decree entered that Schlitz must speculate as to why it was adjudged to have violated the statute. Certainly the spotty comments on Schlitz's proposed findings, which were randomly gleaned from the reply briefs of the government and General Brewing, do not supply the discerning line for decision.

Particularly in light of the Expediting Act, which makes decisions by a single district judge subject only to direct review by this Court, the requirement of adequate and self-prepared findings and conclusions takes on added importance. Without the preparation of findings by the trial court itself, this Court cannot safely know what the lower court's decision means, let alone whether it is right or wrong. Nor can a trial court decision bereft of legal reasoning become a precedent governing future decisions and providing legal guidance for the businessman and his counsel. As this Court has cautioned, it is imperative in the sensitive area of competition that the decision-maker "not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review." *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61, 81 (1953).

Lest a perfunctory and sterile decision thwart the only review available to Schlitz, this Court should grant plenary review of the correctness of the decision below and the essential fairness of the way in which that decision was reached.

Conclusion

For all the preceding reasons, the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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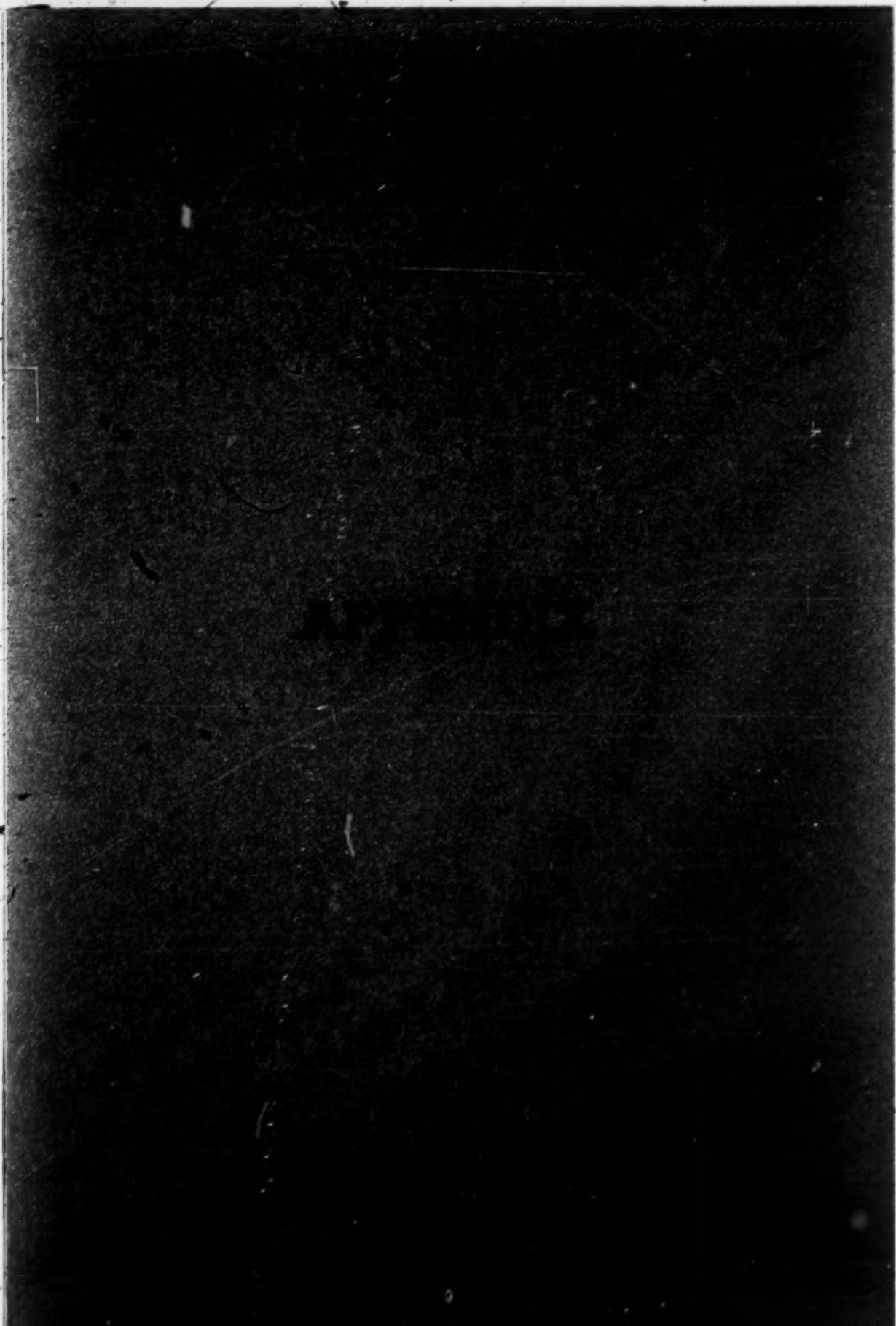
August 26, 1966



IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JOS. SCHLITZ BREWING COMPANY and GENERAL BREWING COMPANY,** **Defendants.**	**Civil Action No. 42127**

The defendant Jos. Schlitz Brewing Company is a Wisconsin corporation engaged in the production and sale of beer. The defendant General Brewing Company is a California corporation so engaged. John Labatt Limited, a large Canadian brewer, controls General Brewing Company through Labatt's ownership of a majority of General's stock.

The gravamen of the charge by the United States of America, plaintiff, is that "The effect of the purchase and acquisition of the assets of Burgermeister Brewing Corporation by defendant Schlitz and of the stock acquisition by defendant Schlitz in John Labatt, Ltd., and of each of them, may be substantially to lessen competition, or tend to create a monopoly in the production and sale of beer in the United States, the West, and the State of California in violation of Section 7 of the Clayton Act . . ." (Complaint, Page 6, lines 23-28).

The evidence adduced at the trial and the applicable law sustain the plaintiff's charge sufficiently to call for granting relief consonant with the plaintiff's prayer. The office of this memorandum is to serve as Findings of Fact

and Conclusions of Law underlying the decree to be entered. The intent is to meet the bench marks indicated, for federal trial courts in cases of this kind, by the Supreme Court in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57, 662-63 (1964).

Extended hearings, briefing and consideration of the trial court with all counsel were focused upon preparation of a definitive Pre-Trial Order approved by all parties. Its scope and content are indicated by the marginal notation of the subject matters listed in its table of contents.[1] That order is referenced here because, for one thing, its delineation of the issues are inserted or grouped as headings in the Findings of Fact below.

The trial court directed the parties to include, in the post-trial briefs of each, their respective proposed Findings

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1. "I. Stipulation as to Jurisdiction and Venue, Page 1; II. Factual Statement of the Parties' Versions of the Events, Page 2; III. Factual Statement of the Parties' Versions of Special Defenses, Page 4; IV. Statement Concerning the Specific Relief Sought, Page 4; V. Statement of Admitted or Undisputed Facts, Page 6; VI. Issues to be Tried, Page 128; VII. Brief Separate Statement of Points of Law, Page 132; VIII. Order With Respect to Witnesses and Exhibits, Page 132; IX. Exhibits Intended to be Offered at the Trial Except Those to be Used for Impeachment Only, Page 135; X. Lists of Witnesses, Page 147; XI. Statement as to Separate Trial of Any Issues of Fact, Page 154; XII. Statement as to Consolidation, Page 154; XIII. Submission Upon an Agreed Statement of Facts, Page 154; XIV. Appointment of an Expert, Page 155; XV. Motion to Dismiss, Page 155; XVI. Pendente Lite Relief, Page 155; XVII. Request for Any Further Discovery, Page 155; XVIII. Amendments to Pleadings, Page 155; XIX. Final Stipulations of Fact, Page 156; XX. Settlement, Page 156; XXI. Informal Pretrial Conferences, Page 156; XXII. Unusual Problems Concerning Trial, Attendance of Parties or Essential Witnesses, or Other Practical Problems, Page 156; XXIII. Further Proceedings and Trial Briefs, Page 157". (Pre-Trial Order, i. (8/5/65)).

and Conclusions. Each set has been reviewed by the trial court. While those proposed by the United States and by General Brewing have provided the basic pattern for the trial court's own Findings and Conclusions, the latter are the product of careful sifting. They incorporate many substantial additions, deletions and revisions as well as numerous other changes including citations to the record. It is believed that the Findings, Conclusions and comment show the reasoning which led this court to its decision on all relevant issues.

A final preliminary matter merits discussion. Some weeks after all parties had rested their cases, defendant Schlitz made a "Motion to Reopen the Record for the taking of Additional Evidence and for Other Relief". The motion was heard upon affidavits, memoranda and argument of counsel. It was predicated upon the post-trial agreement of General Brewing to sell to Miller Brewing Company of Milwaukee, Wisconsin, one of General's breweries, that located in Azusa, California. This brewery represents 34% of General's total potential productive capacity. The motion was opposed by the United States and, of course, by General. It was denied by the trial court in what that court considered a sound exercise of discretion. The moving papers and those filed in opposition made it clear beyond cavil, that (1) the agreement to sell was an exercise of General Brewing's independent business judgment, (2) consummation of the sale would leave General Brewing with more than adequate brewing capacity for all foreseeable increases in sales in all markets which it now taps, (3) General Brewing's receipt of $8,000,000 for the sale would materially strengthen its capacity to compete with all its competitors, including, notably, Schlitz, (4) the sale would improve General Brewing's ability to expand into other areas and (5) it would strengthen General Brewing as a vehicle for Labatt's competition in the U.S. market.

The court did order General Brewing promptly to report to the court all express or tacit commitments for any subsequent disposition of any major assets, thus assuring the court of ample opportunity to protect Schlitz in the matter, for example, of its professed concern that General Brewing was engaging in a process of liquidation, despite documented and convincing contrary assurance to the court on General Brewing's part.

FINDINGS OF FACT

Jurisdiction

1. Defendant Jos. Schiltz Brewing Company (hereinafter referred to as "Schlitz") is a corporation organized and existing under the laws of the State of Wisconsin, with its principal office located in Milwaukee, Wisconsin. (Pre-Trial Order, p. 1).

2. Defendant General Brewing Corporation (formerly known as Lucky Lager Brewing Company and hereinafter referred to as "General Brewing") is a corporation organized and existing under the laws of the State of California, with its principal office located in San Francisco, California. (Pre-Trial Order, p. 1).

3. John Labatt Limited (hereinafter referred to as "Labatt") is a Dominion corporation organized and existing under the laws of the Dominion of Canada, with its principal office in London, Ontario, Canada. (Pre-Trial Order, p. 2).

4. Prior to December 31, 1961, Burgermeister Brewing Corporation (hereinafter referred to as "Burgermeister") was a corporation organized and existing under the laws of the State of California, with its principal office in San Francisco, California. (Pre-Trial Order, p. 2).

5. Defendants Schlitz and General Brewing are engaged in commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. §18. Prior to December 31, 1961, when its assets were purchased by Schlitz, Burgermeister was engaged in commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. §18. (Pre-Trial Order, p. 2).

6. Both defendants transact business and are found within the Northern District of California, Southern Division. (Pre-Trial Order, p. 2).

7. The action arises and is brought by the plaintiff under the antitrust laws of the United States, more particularly the Clayton Act, 15 U.S.C. §§18 and 25. (Pre-Trial Order, p. 1).

Issues Relating To Line of Commerce

1. Is the production and sale of beer a line of commerce within the meaning of Section 7 of the Clayton Act and the appropriate product market for determining the effects on competition of the acquisitions by defendant Jos. Schlitz Brewing Company of the assets of Burgermeister Brewing Corporation and of stock of John Labatt Limited?

2. Is the production and sale of all malt beverages a separate line of commerce within the meaning of Section 7 of the Clayton Act, and if so, is it an appropriate line of commerce to be considered in determining the effects on competition of the acquisitions challenged by the complaint?

3. Is the production and sale of each price level of beer, one of the malt beverages, a separate line of commerce within the meaning of Section 7 of the Clayton Act, and if so, is each level an appropriate line of commerce to be considered in determining the effects on competition of the acquisitions challenged by the complaint?

4. Is the production and sale of ale, another of the malt beverages, a separate line of commerce within the meaning of Section 7 of the Clayton Act, and if so, is it an appropriate line of commerce to be considered in determining the effects on competition of the acquisitions challenged by the complaint?

8. The term "beer", in the context of the relevant line of commerce, includes beer, lager, ale, porter, stout and malt liquor, even though there is some conflict in expert testimony and that of members of the industry as to ale. A single brewery can produce beer, lager, ale, porter, stout and malt liquor. Moreover, regardless of the niceties of definition, sales in the United States of lager, ale, porter, stout and malt liquor are so insignificant, compared with sales of beer, as to make the inclusion or exclusion of lager, ale, porter, stout and malt liquor, or any one or more of them, of no consequence to any issue in this case. (Tr. 387, line 20—393, line 19; Tr. 150, line 6—151, line 11; Tr. 1552, lines 6-8; Tr. 468, lines 1-5).

9. Beer is produced in unique production facilities, breweries, and is marketed through specialized vendors who are referred to as wholesalers or distributors. (Tr. 192, line 25—193, line 10; Tr. 158, lines 13-25; Tr. 1552, lines 6-8).

10. There is very little difference in price or quality between the cheapest and the most expensive ingredients used in brewing beer in the United States. (Tr. 316, lines 10-16; Tr. 404, lines 6-20; Tr. 405, lines 20-23; Tr. 389, lines 3-19).

11. Beer has its own pricing structure and sells at a wide spectrum of prices; in California, for example, the range is from 79 cents through $1.44 per six-pack of 12-oz. cans. (Pre-Trial Order, pp. 85-115; Tr. 1517, line 1—1519, line 19).

12. For many years it has been the practice in the brewing industry to refer to various brands of beer by terms such as "premium beer", "regional beer" or "popularly priced beer" and "local price" or "shelf beer". The term premium beer has generally referred to those beers which have been priced somewhat higher than the popular or regional beers. Such premium beers include Budweiser (Anheuser-Busch, Inc.), Schlitz (Jos. Schlitz Brewing Co.), and Miller High Life (Miller Brewing Co.). Popularly priced or regional beers include such brands as Lucky Lager (General Brewing Co.), Burgermeister (Jos. Schlitz Brewing Co.), Hamms (Theo. Hamm Brewing Co.), and Falstaff (Falstaff Brewing Corp.). The so-called price beers are beers which generally are not extensively advertised and sell at a price below that of the popularly priced beers. Such beer is often sold by grocery store chains as private label beer, i.e., the specified chain has the exclusive right to sell beer under the label. Other beers exist which do not fit into any of the particular categories described above. For example, Coors beer and Olympia beer sell in California at prices midway between the premium and the popular level. Miller High Life sells in some areas, such as California, at a price above Budweiser and Schlitz. Other beers sell at a price midway between the popular and the price beer level. Some beers have moved from one category to another or have shifted from a category to an in-between level. (Pre-Trial Order, p. 9; Tr. 1517-1519).

13. There are no significant differences in the costs of labor nor equipment for production of the various brands of beer. (Tr. 434, lines 6-15).

14. All brands and types of beer compete with each other in price, image, point of sale advertising, media ad-

vertising, shelf space, floor display, refrigerator position and in attention from wholesalers and retailers. (Tr. 114-116; Tr. 193, lines 11-17; Tr. 208, line 20—209, line 4; Tr. 316, line 9; Tr. 343, lines 16-22; Tr. 454, line 4; Tr. 585, line 21—587, line 4; Tr. 1236, line 21—1237, line 8; Tr. 1579, lines 1-11; Tr. 1583, line 18; Tr. 1588, line 18 *et seq.*; Tr. 1856, line 13—1857, line 24).

15. There is both public and industry recognition of beer as a separate and unique product. (Tr. 193, line 15; Tr. 386, line 20; Tr. 387, line 9; Tr. 454, lines 7-22; Tr. 1598, lines 13-20; Tr. 1856, line 24—1857, line 5; see also citations for Finding 14).

16. Beer is a line of commerce. (Findings 8-15, inclusive).

Issues Relating To Section of the Country

5. Are the following areas, or any of them, sections of the country within the meaning of Section 7 of the Clayton Act:

(a) The United States;

(b) the eight Western States of California, Oregon, Washington, Idaho, Montana, Nevada, Utah and Arizona;

(c) the State of California;

(d) the State of Hawaii;

(e) or some part of the United States less than the entire United States but larger than or different from the eight Western States;

and if so, is each or any such section a relevant geographic market to be considered in determining the effects on competition of the acquisitions challenged by the complaint?

17. The United States as a whole is a geographic market for the production and sale of beer. (Tr. 956, lines 21-22; Tr. 592, line 8; Tr. 482, lines 7-11).

18. The Eight Western States area consists of the contiguous States of California, Oregon, Washington, Idaho, Montana, Nevada, Utah and Arizona. Its boundaries are the Pacific Ocean, the Canadian and Mexican borders, and, approximately, the Continental Divide.

19. Freight rates are a substantial factor in the sale of beer. (Tr. 204, line 13; Tr. 91, lines 21-23; Tr. 313, lines 17-19; Tr. 451, line 19—452, line 10).

20. Most breweries and the bulk of brewing capacity in the western portion of the United States are located along the Pacific Coast. (Pre-Trial Order, pp. 47-49).

21. Freight rates make it more economical for brewers to supply beer to points west of the Continental Divide from Pacific Coast breweries, rather than from Eastern or Midwestern breweries. Brewers who have breweries both on the Pacific Coast and in the Midwest generally supply the Eight Western States area from their Pacific Coast breweries and supply areas east of the Eight Western States area from their Midwestern breweries. (Tr. 1354, line 16—1355, line 3; Tr. 584, line 11—585, line 3; Plaintiff's Exhibit 35).

22. Brewers attempt, for profit purposes, to sell a maximum quantity of their production as close as possible to the brewery at which it is produced. (Tr. 94, lines 2-11; Tr. 314, line 22).

23. Approximately 80% of all beer sold within the Eight Western States in 1963 was produced in that area. An additional 13.6% was produced in Denver, Colorado, just outside the area. (Pre-Trial Order, pp. 47-49, 65-68).

24. Over 94% of the beer produced in the Eight Western States in 1963 was sold in that area. (Pre-Trial Order, pp. 47-49, 65-68).

25. The Eight Western States area is the principal marketing territory for General Brewing; about 90% of its sales are concentrated there. (Tr. 451, lines 6-11; Tr. 475, lines 15-25).

26. National brewers have, or, in the case of Schlitz, have had in the recent past, separate sales organizations to handle the western market. The great majority of brewers recognize the existence of a western market for beer. (Tr. 584, line 10; Tr. 199, lines 13-17; Tr. 1334, lines 10-14; Tr. 200, lines 5-12; Plaintiff's Exhibit 1, pp. 9-10).

27. The Eight Western States area is a separate geographic market for the production and sale of beer. (Findings 18-26, inclusive).

28. The State of California is an area of heavy production and consumption of beer. During the period between 1947 and 1963, consumption of beer in California has increased six times as much as the nationwide increase in consumption of beer. In 1963, California accounted for about 8% of the total amount of beer consumed in the United States. (Pre-Trial Order, pp. 13, 14, 46, 48, 64).

29. The State of California is an area of intense competition in the sale of beer. (Pre-Trial Order, pp. 14-46; Tr. 487, lines 1-8; Tr. 1360-1361; Tr. 960, line 20—961, line 3).

30. Approximately 60% of General Brewing's sales are made in the State of California. Prior to its acquisition by Schlitz, approximately 96% of Burgermeister's sales were made in the State of California. (Tr. 451, lines 3-5; Tr. 89, lines 20-23).

31. The State of California is recognized by the brewing industry as a separate sub-market for the production and sale of beer. (Tr. 112, line 16; Tr. 197, line 9; Tr. 313, line

18; Tr. 337, line 25; Tr. 456, line 15—457, line 6; Tr. 1888, lines 6-19; Tr. 338, lines 7-17).

32. The State of California is an integrated, homogeneous market for the production and sale of beer. (Tr. 110, lines 15-19).

33. The State of California is a separate geographic sub-market for the production and sale of beer. (Findings 28-31, inclusive).

34. The State of Hawaii is geographically isolated from the continental United States, and it has a unique group of beer consumers whose local pride requires special marketing techniques. (Tr. 457, lines 10-18; Tr. 1336, lines 14-17).

35. Approximately 6% of General Brewing's sales are made in Hawaii. This represented about 41.2% of the total amount of beer sold in Hawaii in 1963. (Tr. 476, lines 15-17; Plaintiff's Exhibit 34).

36. The State of Hawaii is a separate market for the sale of beer. (Tr. 457, lines 10-17).

37. The State of Hawaii is a separate geographic submarket for the production and sale of beer. (Findings 34-36, inclusive).

Issues Generated By The Schlitz Acquisition of An Interest in Labatt

6. Will the reasonably probable effect of the acquisition by defendant Jos. Schlitz Brewing Company of stock of John Labatt Limited be substantially to lessen competition or to tend to create a monopoly in an appropriate line of commerce in one or more of the relevant sections of the country?

7. Will the reasonably probable effect of the indirect acquisition of an interest in General Brewing Corporation by defendant Schlitz be substantially to lessen

competition or to tend to create a monopoly in an appropriate line of commerce in one or more relevant sections of the country?

8. Is John Labatt Limited a corporation engaged in commerce within the meaning of Section 7 of the Clayton Act?

9. Was the purchase of stock of John Labatt Limited by defendant Jos. Schlitz Brewing Company solely for the purpose of making an investment in Canada?

10. Is the acquisition of a stock interest in John Labatt Limited by defendant Schlitz an investment exempt from the prohibition of Section 7 of the Clayton Act?

38. Defendant Schlitz is the Nation's second largest brewer, with 1964 sales of $311,394,654 and with seven breweries located throughout the country. From 1954 to 1964, its share of the California market rose (with some intermediate ebb and flow) from 2.40% to 12.1%. (Pre-Trial Order, pp. 116, 36-46; Plaintiff's Exhibit 11).

39. In February 1964, Schlitz acquired 39.3% of the stock of John Labatt Limited, a sufficient amount for voting control of the latter. (Schlitz Answer to Complaint, p. 5, lines 17-20; Tr. 797, lines 5-11; Plaintiff's Exhibit 11, p. 5).

40. John Labatt Limited is the third largest Canadian brewer, with 1964 sales of $108,585,537 and with seven breweries located throughout Canada. (Pre-Trial Order, p. 117; Tr. 633, lines 16-22; Plaintiff's Exhibit 17).

41. John Labatt Limited controls 63.5% of the common stock of General Brewing Corporation. (Pre-Trial Order, p. 117; Defendant Schlitz Exhibit 198).

42. General Brewing was the 14th largest U.S. brewer in 1963, and has two plants in California, one in Washing-

ton, and one in Utah. General Brewing in 1963 ranked second in the California beer market, with 13.7% of sales, second in the Eight Western States market with 13.3% of sales, and first in the Hawaii market with 41% of sales. (Pre-Trial Order, pp. 56, 48, 49, 45, 65-67, 50).

43. A strong trend toward concentration exists in the brewing industry. Since 1952 the number of plants has decreased from 334 to 190 in 1964, and the number of companies has decreased from 307 to 144 in 1964, while tax paid withdrawals have increased from 84,293,646 barrels to 96,247,413 barrels in 1964. (Pre-Trial Order, p. 71; Plaintiff's Exhibit 25).

44. The share of beer sales accounted for by the 10 largest and 25 largest brewers has increased from approximately 40% and 60%, in 1953, to approximately 57% and 82%, in 1963, respectively. (Pre-Trial Order, pp. 57-58; Plaintiff's Exhibits 26, 27).

45. The rank and market share of each of the 25 largest sellers of beer in the United States in each of the years 1939-1963 is shown in Appendix A hereof. (Pre-Trial Order, pp. 51-58).

46. A trend toward concentration also exists in the Eight Western States area and in California. (Pre-Trial Order, pp. 62, 75; Plaintiff's Exhibits 28, 30).

47. The trend toward concentration in the beer industry will continue unabated. (Tr. 328, line 22—329, line 10; Tr. 590, lines 7-10; Tr. 408, line 3—409, line 1).

48. Acquisitions and mergers have played an important part in the trend toward concentration in the brewing industry. A substantial number of these acquisitions and mergers involved the largest brewers and a majority were of

regional firms in the larger size categories, which stand the best chance for independent survival. Schlitz has made many of these acquisitions. (Pre-Trial Order, pp. 118-127; Defendant Schlitz Exhibit 192; Tr. 2099, line 23—2100, line 4).

49. It is extremely difficult for a new firm to enter the United States brewing industry due to the great expense of buying or building a plant and acquiring sufficient business to support it. The present cost of building a million barrel brewing facility is between $30,000,000 and $35,000,000. So far as the record discloses, just one brewery, Carlings of Canada, has successfully entered the industry in the United States since 1947. (Tr. 409, line 7—411, line 21; Tr. 190, line 15—192, line 3).

50. Control of General Brewing by Schlitz will give Schlitz over 10% of the national beer market, raising it from second to first ranked, and will give the two largest brewers over 20% of the national beer market. (Pre-Trial Order, pp. 51-58).

51. The market share of each major seller of beer in the Eight Western States in 1963 and the total sales of beer in the Eight Western States in 1963 are shown in Appendix B hereof. (Pre-Trial Order, pp. 65-68; Plaintiff's Exhibit 53).

52. The tax paid withdrawals of each brewery operated in the Western States, for each of the years 1960 through 1963, inclusive, are set forth by State at pages 48 and 49 of the Pre-Trial Order, in evidence. (Pre-Trial Order, pp. 48-49).

53. Control of General Brewing by Schlitz will enhance the trend of acquisitions and mergers in the brewing industry and will substantially increase concentration in the brewing industry nationally, in the Eight Western States,

in California, and in Hawaii. (Pre-Trial Order, pp. 51-59, 48-49, 65-67, 14-46, 50; Plaintiff's Exhibits 26-30, 32-34; Tr. 605, lines 12-13).

54. The market share of each major seller of beer in California and total beer sales, for each of the years 1933 through 1964, inclusive, is shown in Appendix C hereof. (Pre-Trial Order, pp. 11-46).

55. Control of General Brewing by Schlitz will give Schlitz six breweries, 22.9% of production, 23% of sales in the Eight Western States, making Schlitz the largest seller of beer in the area. (Pre-Trial Order, pp. 48-49, 65-67; Plaintiff's Exhibit 29).

56. Control of General Brewing by Schlitz will give Schlitz 38.9% of production and 26.8% of sales in California, making it the largest seller of beer in that state, and nearly twice as large as the second ranked firm. (Pre-Trial Order, pp. 48-49, 45; Plaintiff's Exhibits 32, 33).

57. The market share of each seller of beer in Hawaii and total sales of beer in Hawaii for each of the years 1961, 1962 and 1963 are shown in Appendix D hereof. (Pre-Trial Order, p. 50).

58. Control of General Brewing by Schlitz will give Schlitz 50.9% of beer sales in Hawaii. (Pre-Trial Order, p. 50; Plaintiff's Exhibit 34).

59. Distributors (also referred to as wholesalers) are extremely important to successful competition of brewers in the brewing industry. Control of General Brewing by Schlitz will place General's distributor "system" in Schlitz' hands and will result in a significant competitive advantage to Schlitz and a substantial competitive disadvantage to its competitors. (Tr. 335, lines 7-15; Tr. 347, line 7—350, line 3; Tr. 352, line 15—359, line 8; Tr. 212, lines 13-24; Tr. 213,

line 24—214, line 1; Plaintiff's Exhibit 45; Tr. 217, line 19—218, line 1; Tr. 490, lines 1-3; Tr. 158, lines 13-25).

60. Control of General Brewing by Schlitz will result in a substantial lessening of competition in the sale of beer in the United States, the Eight Western States, the State of California, and the State of Hawaii. (Tr. 489, lines 17-24; Tr. 352, lines 15-19; Findings 38-67).

61. At the time Schlitz purchased its stock in John Labatt Limited, Labatt and General Brewing had formulated and partially put into effect plans to expand General Brewing eastward to become a national brewer. (Tr. 463, lines 2-25; Tr. 464, lines 6-19; Tr. 715, line 25—716, line 3; Tr. 780, line 3—782, line 13).

62. The plans of Labatt and General Brewing are based on General's need to overcome its natural disadvantages as a regional brewer, and Labatt's need and desire to market in the United States to meet the advertising spill-over advantage currently possessed by its largest competitor, Canadian Breweries Ltd. (Pre-Trial Order, p. 69; Tr. 462, line 12—463, line 1; Tr. 632, line 19—635, line 15).

63. In connection with the plans to expand General Brewing, and also in its role as the parent corporation, Labatt has given extensive practical and technical assistance to General Brewing of great value to the latter. (Tr. 635, lines 14-16; Tr. 703, line 2—708, line 21; Tr. 470, lines 17-19).

64. Labatt has also helped General Brewing to introduce a premium priced beer under the Labatt brand which General Brewing executives felt was needed. (Tr. 709, line 17—710, line 23; Tr. 1185, lines 7-24; Tr. 1613, line 23—1614, line 13).

65. At the time of its acquisition of Labatt stock, Schlitz

attempted to eliminate potential competition of Labatt by attempting to halt the introduction of Labatt beer into the United States by General Brewing. (Tr. 711, line 18—712, line 15; Plaintiff's Exhibit 7).

66. Labatt and General Brewing's plans represent substantial potential competition in the United States, the Eight Western States and California which will be eliminated if Schlitz is allowed to control Labatt. (Findings 60-65, *supra*).

67. Schlitz' acquisition of stock of Labatt will result in a substantial lessening of actual and potential competition, and will tend to create a monopoly, in the production and sale of beer in the United States as a whole, the Eight Western States, the State of California, and the State of Hawaii. (Findings 38-66, *supra*).

68. John Labatt Limited each year sells approximately $2,000,000 worth of beer in 20 States of the United States, located for the most part in the Midwest and eastern portions of the United States. This beer is produced in Labatt's Canadian breweries. (Tr. 783, line 2; Tr. 784, lines 2-5; Plaintiff's Exhibit 12).

69. To facilitate these sales, Labatt has organized a distribution system in the United States composed of two master distributors and a number of local distributors. (Tr. 784, lines 8-13).

70. In order to stimulate sales of its beer in the United States, Labatt provides advertising allowances, finances shared advertising programs, and makes partial payment of salesmen's salaries. (Tr. 788, line 16—790, line 4).

71. Labatt sales in the United States are supervised by Labatt's export manager, who spends one-third to one-half

of his time in the United States working with the master distributors and local distributors. (Tr. 786, line 24—788, line 9).

72. Approximately 20% to 25% of the Labatt beer sold in the United States is shipped to the United States on Labatt-owned trucks. (Tr. 786, lines 4-6).

73. Orders for Labatt beer are placed by telephone by United States distributors to the brewery, sometimes as frequently as daily. (Tr. 785, lines 9-12).

74. Labatt deals directly with government agencies in the United States in obtaining approval for marketing its beer in the United States. (Tr. 790, line 5—791, line 4).

75. The continuous flow of Labatt beer from Canada to Labatt's distributors in the United States constitutes an engagement in foreign and interstate commerce by John Labatt Limited. (Tr. 783-790).

76. John Labatt Limited engages in commerce in the United States through its control of, and close business relationship with and assistance to, General Brewing Corporation. (Tr. 703, line 2—708, line 21; Pre-Trial Order, p. 117, lines 4-9).

77. From the outset of the negotiations Schlitz sought working control of John Labatt Limited. But for the issuance of the temporary restraining order, Schlitz obtained and would now have such control. (Tr. 1103, line 4; Tr. 1315, line 2; Tr. 717, lines 15-18; Tr. 824, lines 3-16).

78. Schlitz purchased 1,700,000 shares, or 39.3% of the Labatt stock at $23 (Canadian) a share at a price which was described to Labatt shareholders as "an historically high level" and one appearing "to discount future growth of the Company [Labatt] for some years." (Plaintiff's Exhibit 22).

79. Schlitz was correctly advised by the Labatt management that its acquisition of Labatt stock would meet with an adverse reaction from the Canadian public. (Tr. 719, lines 14-22; Tr. 765, line 6—766, line 13).

80. During the course of negotiations for Schlitz' acquisition of a controlling interest in Labatt, both parties recognized the possible anti-competitive consequences of consummation. (Tr. 718, line 9—722, line 6).

81. The possibility of Labatt management marketing Schlitz brand beer was discussed but never resolved between Labatt and Schlitz. (Tr. 817, line 21—819, line 7).

82. During the course of negotiations Schlitz sought to dissuade Labatt from introducing the Labatt brand of beer through General Brewing. (Tr. 711, line 18—713, line 17; Plaintiff's Exhibit 7).

Issues Generated By The Schlitz Acquisition of Burgermeister

11. May plaintiff challenge in these proceedings the acquisition of the assets of Burgermeister Brewing Corporation by defendant Schlitz?

12. Was Burgermeister Brewing Corporation a failing firm?

13. Will the reasonably probable effect of the acquisition by defendant Schlitz of all of the assets, except cash, of Burgermeister Brewing Corporation be substantially to lessen competition or to tend to create a monopoly in an appropriate line of commerce in one or more of the relevant sections of the country?

83. Shortly before the acquisition of Burgermeister by Schlitz, the Department of Justice requested Schlitz to submit detailed information concerning the transaction; in

response, Schlitz submitted certain information concerning its acquisition of Burgermeister and relating to the business of each of the companies; after consideration of the information submitted by Schlitz, counsel for Schlitz was advised that the Department of Justice was not prepared to take any action at that time to block the Schlitz acquisition of Burgermeister; the Department of Justice took no action at that time to block the Schlitz acquisition of Burgermeister. (Defendant Schlitz Exhibits 52, 207; 53A-P, 207).

84. Defendant Schlitz did not submit a written request for written clearance of its acquisition of Burgermeister; (The record is barren of any proof that the Department of Justice gave clearance to the acquisition of Burgermeister by defendant Schlitz). (Defendant Schlitz Exhibit 207).

85. Defendant Schlitz requested and obtained clearance letters from the Department of Justice for its acquisition of the Hawaii Brewing Company and a Puerto Rican brewery. (Tr. 1312, line 10—1313, line 3).

86. Oral clearances for mergers or acquisitions are not given by the Antitrust Division. (Tr. 1781, line 2—1782, line 17).

87. The sales by dollar and volume and after-tax earnings by Burgermeister in the five years preceding its acquisition were as follows:

Year	Sales	Volume (barrels)	After-Tax Earnings
1957	$37,319,900	973,501	$1,013,829
1958	37,221,851	971,502	988,823
1959	38,197,664	974,347	944,687
1960	35,554,000	892,711	720,951
1961	29,154,891	726,533	408,602

(Pre-Trial Order, pp. 43, 116; Plaintiff's Exhibits 3, 4; Defendant Schlitz Exhibits 53K, 53L).

88. In 1960, Burgermeister was the third largest selling California brewery accounting for 10.7% of all beer sold in the State of California. (Pre-Trial Order, p. 42).

89. Burgermeister's one brewery, located in San Francisco, California, was completely rebuilt during the period from 1944 to 1948. (Tr. 89, lines 3-13).

90. In 1960 Burgermeister had one of the most modern plants, equipped with the finest draft beer equipment, in the United States. (Tr. 89, lines 14-16; Tr. 105, lines 21-24).

91. At the time of its acquisition by Schlitz, Burgermeister had an exceptionally strong distributor organization. (See Finding 59 as to the great value of this.) (Tr. 95, lines 19-23; Tr. 158, lines 5-10; Tr. 188, lines 8-9).

92. 1960 was the twenty-first consecutive year in which Burgermeister Brewing Corporation paid dividends to its shareholders. (Plaintiff's Exhibit 4, p. 2).

93. At the time its assets were purchased by Schlitz, Burgermeister Brewing Corporation had no long-term outstanding debts. (Plaintiff's Exhibit 4, p. 5).

94. At the time its assets were purchased by Schlitz, Burgermeister Brewing Corporation was a solvent corporation in a healthy financial position. (Plaintiff's Exhibits 3, 4; Tr. 105, lines 10-24; Tr. 1543, line 16—1544, line 22).

95. At the time its assets were purchased by Schlitz, Burgermeister Brewing Corporation was not in a deteriorating or declining condition nor could it be termed a failing plant. (Plaintiff's Exhibits 3, 4; Tr. 187, line 25—188, line 9; Tr. 2065, lines 3-6).

96. In 1960 Miller Brewing Company offered to purchase Burgermeister for $11,000,000. This offer was raised

to $12,000,000 in March of 1961. (Tr. 160, lines 7-8; Tr. 169, lines 5-8; Tr. 187, lines 4-11).

97. On December 29, 1961, defendant Schlitz purchased the assets of Burgermeister, except for cash in the amount of $1,700,000, for $12,039,250. (Plaintiff's Exhibit 1, p. 3).

98. Had Burgermeister in 1961 spent its usual amount for advertising, including point-of-purchase advertising and service costs, the net earnings for 1961 would have been over one million dollars. (Tr. 104, lines 12-19; Tr. 139, lines 1-25).

99. From 1948 to 1961 several national brewers who had no brewing facilities in California, acquired California breweries. (Pre-Trial Order, pp. 12, 13, 40-43, 120, 121).

100. The volume and market share of firms brewing or selling beer in California for the years 1955 through 1964, inclusive, are shown at pages 37-46 of Appendix C hereof. (Pre-Trial Order, pp. 37-46).

101. For the years 1955 through 1960, Burgermeister's sales in California, its rank and its percentage of the California market were as follows:

Year	Calif. Sales (barrels)	Rank	Percent of Market
1955	977,561	2	16.12
1956	943,762	2	14.97
1957	887,798	3	13.53
1958	886,359	3	12.78
1959	887,106	4	11.93
1960	805,289	3	10.7

(Pre-Trial Order, pp. 37-42).

102. For the years 1955 through 1960, Schlitz sales in California, its rank and its percentage of the California market were as follows:

Year	Calif. Sales (barrels)	Rank	Percent of Market
1955	243,190	9	4.01
1956	264,860	9	4.20
1957	283,692	9	4.32
1958	273,331	10	3.94
1959	292,559	10	3.94
1960	293,238	11	3.9

(Pre-Trial Order, pp. 37-42).

103. The dollar value of beer sales by Burgermeister Brewing Corporation for each of the years 1957 through 1960 in each of the States in which it sold are shown on Appendix E hereof. (Plaintiff's Exhibit 5).

104. 1961 sales for Burgermeister are not reliable indicia of the effect of the Schlitz acquisition of the Burgermeister assets because such sales were seriously distorted by the demoralizing effect of awareness, in the industry, its distributors and corporate personnel, of negotiations for the sale of Burgermeister which commenced in 1960. (Tr. 104, line 4—105, line 4; Tr. 1544, lines 3-11).

105. In 1961 Schlitz was the tenth ranking brewer in California and had 3.6% of the California market. In 1962 Schlitz was the third ranking brewer in California and had 12.3% of the California market. (Pre-Trial Order, pp. 43, 44).

106. At the time of its acquisition by Schlitz, Burgermeister was a substantial independent competitor in California. (Tr. 497, lines 14-16; Tr. 1620, lines 5-8; Pre-Trial Order, pp. 42, 43).

107. After Schlitz acquired Burgermeister, Schlitz attempted to have its wholesalers carry a full line of Schlitz products. (Tr. 1270, lines 7-13).

108. When Schlitz acquired Burgermeister, it was able to choose between the Schlitz and the Burgermeister wholesaler. Schlitz thus was able to strengthen its wholesaler organization by choosing the more effective of the two wholesalers. (Plaintiff's Exhibit 2).

109. In the first six months following the acquisition of Burgermeister by Schlitz, Schlitz terminated on its own initiative its relationship with thirty-nine beer distributors in various market areas of the West. Fourteen of these were former Burgermeister distributors, and twenty-five of these were former Schlitz distributors. Eight of the fourteen former Burgermeister distributors were in California, and twenty-three of the twenty-five former Schlitz distributors were in California. (Answer of Defendant Jos. Schlitz Brewing Company to Plaintiff's First Set of Interrogatories to Said Defendant, pp. 55-76).

110. Schlitz' ability to choose between the Schlitz and Burgermeister wholesaler when it acquired Burgermeister caused substantial detriment to other brewers whose beers were formerly being sold by either the Schlitz or Burgermeister wholesaler. (Tr. 1609, lines 5-19; Tr. 1611, lines 20-25; Tr. 493, line 17—493A, line 2; Tr. 188, line 25—190, line 14; Tr. 220, line 8—222, line 20; Tr. 290, line 14—292, line 6).

111. General Brewing Company and Miller Brewing Company are two examples of breweries who were detrimentally affected by the Schlitz acquisition of Burgermeister in that their distributor organizations were disrupted. (Tr. 1203, lines 2-7; Tr. 1226, lines 3-14; Tr. 190, lines 2-14; Tr. 205, lines 6-12; Tr. 212, line 3—214, line 16; Tr. 226, lines 11-19).

112. At the time of the Schlitz acquisition of Burgermeister, Miller Brewing Company had twenty-two joint

distributors with Burgermeister. After the acquisition, six of these dropped Miller and took on Schlitz, six dropped Burgermeister and stayed with Miller, two went out of business after having Burgermeister withdrawn from them, four took on Schlitz and retained Miller, and four did not take on Schlitz. (Tr. 188, line 25—189, line 10; Tr. 220, line 8—222, line 20).

113. At the time of its acquisition of Burgermeister, Schlitz was distributing its popular priced beer, Old Milwaukee, in the middle west, southern, and southeastern States. (Tr. 1252, lines 5-17).

114. Old Milwaukee's marketing area has been expanded so that it is now being sold in substantially every other State where Burgermeister is not presently marketed. (Tr. 1304, line 24—1305, line 9).

115. Since its acquisition of Burgermeister, Schlitz has succeeded in expanding Burgermeister's selling area eastward until it has met that of Old Milwaukee. (Tr. 1346, line 21—1347, line 6).

116. In 1961 Schlitz was aware that in order to improve its position on the West Coast, it could either introduce its own popular priced brand or acquire a going brand. (Plaintiff's Exhibit 2, pp. 2, 3).

117. It would have been very costly for Schlitz to introduce its own brand on the West Coast in 1961. (Plaintiff's Exhibit 2, p. 2).

118. But for its acquisition of the Burgermeister assets, Schlitz would have introduced its own popular priced beer on the West Coast. (Plaintiff's Exhibit 2).

119. The changes in its distributor organization that Schlitz effectuated after it acquired the assets of Burger-

meister resulted in a substantial lessening of competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. (Findings 107-112, *supra*).

120. The failure of Schlitz to introduce its own popular priced brand beer into the West Coast because of its acquisition of the assets of Burgermeister resulted in a substantial lessening of actual and potential competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. (Findings 113-118, *supra*).

121. The elimination of Burgermeister as a substantial independent competitor by Schlitz' purchase of the assets of Burgermeister resulted in a substantial lessening of competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. (Findings 95, 106, *supra*).

122. The purchase of the assets of Burgermeister by Schlitz further enhanced the trend toward concentration in the brewing industry, resulting in a substantial lessening of competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. (Findings 43-49, 99, *supra*).

123. The acquisition of the assets of Burgermeister by Schlitz resulted in a substantial lessening of actual and potential competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. (Findings 99-118, *supra*).

124. The evidence was not sufficient to establish that the Schlitz acquisition of Burgermeister resulted in a substantial lessening of competition, actual or potential, nor in a tendency to create a monopoly in the production and sale of beer in the United States or in Hawaii.

125. The acquisition by Schlitz of the assets of Burgermeister, in connection with Schlitz' subsequent acquisition of Labatt stock and thereby control of General Brewing, is further evidence of the continuing trend toward concentration in the brewing industry in general and of the attempts by Schlitz, in particular, to increase its sales and market share by the acquisition of competitors. (Findings 38, 43, 44, 45, 46, 47, 48, 50, 53, 59, 65, 80, 82, 85, 97, 104, 105, 106, 107, 109, 111, 112, 118, 119-24).[2]

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2. The Pre-Trial Order, under the heading "Purposes of Defendant Schlitz", stated Issues 14 and 15 as follows. "14. If the evidence adduced at trial shows that the acquisition of a stock interest in John Labatt Limited by defendant Schlitz was for the purpose of participating in the Canadian market, is this a transaction subject to Section 7 of the Clayton Act? 15. Is the acquisition by defendant Schlitz of a stock interest in John Labatt Limited subject to Section 7 of the Clayton Act regardless of the purpose of the acquisition?" As to Issue 14, Schlitz did adduce some evidence in support of the claim that its acquisition of the stock interest in Labatt was for the purpose of participating in the Canadian market. But it was not convincing evidence. As the Findings show, the focus of Schlitz' interest in the acquisition was really in connection with the United States market and areas therein. In any case, the issue posed by 14 is ultimately one of law and the law is clear that even if *the* purpose of Schlitz, or *a* purpose of Schlitz, was for participation in the Canadian market, that would not immunize against the proscriptions of Section 7 of the Clayton Act. As to Issue 15, the only "purpose" which might have justified the acquisition under the provisions of Section 7 of the Clayton Act would have been purchase of the Labatt stock "solely for investment" as provided and spelled out in the statute. There is no credible evidence to support any claim that the Schlitz purchase of Labatt stock was "solely for investment" and the claim, if made by Schlitz, appears to have been abandoned.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of the complaint herein and the parties hereto.

2. The production and sale of beer is a line of commerce within the meaning of Section 7 of the Clayton Act, the relevant provisions of which are set forth in Appendix F hereof. Beer is the appropriate product market for determining the effects on competition of the acquisitions by defendant Jos. Schlitz Brewing Company of the assets of Burgermeister Brewing Corporation and of stock of John Labatt Limited.

United States v. *Continental Can Co.*, 378 U.S. 441, 456-57 (1964).

Brown Shoe Co. v. *United States*, 370 U.S. 294, 325-26 (1962).

United States v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957).

A. G. Spalding & Bros., Inc. v. *Federal Trade Commission*, 301 F.2d 585, 604 (3rd Cir. 1962).

Crown Zellerbach Corporation v. *Federal Trade Commission*, 296 F.2d 800, 811 (9th Cir. 1961), *cert. den.*, 370 U.S. 937 (1962).

American Crystal Sugar Co. v. *Cuban-American Sugar Co.*, 259 F.2d 524, 529-30 (2d Cir. 1958).

Hamilton Watch Co. v. *Benrus Watch Co.*, 114 F. Supp. 307, 311 (D. Conn. 1953), *affirmed*, 206 F.2d 738 (2d Cir.).

3. There are no distinguishable price levels of beer which constitute relevant product sub-markets within the line of commerce found by the Court and designated as the production and sale of beer.

United States v. *Continental Can Co.*, 378 U.S. 441, 456-57 (1964).

Brown Shoe Co. v. *United States*, 370 U.S. 294, 325-26 (1962).

Hamilton Watch Co. v. *Benrus Watch Co.*, 114 F. Supp. 307, 311 (D. Conn. 1953), *affirmed*, 206 F.2d 738 (2d Cir.).

4. The following areas are each sections of the country for the production and sale of beer, within the meaning of Section 7 of the Clayton Act, and each is a relevant geographic market to be considered in determining the effects on competition of the acquisitions challenged by the complaint:

the United States;
the Eight Western States of California, Oregon, Washington, Idaho, Montana, Nevada, Utah and Arizona;
the State of California;
the State of Hawaii.

United States v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964).

United States v. *The Philadelphia National Bank*, 374 U.S. 321, 357, 360-61 (1963).

Brown Shoe Co. v. *United States*, 370 U.S. 294, 336-37 (1962).

Crown Zellerbach Corporation v. *Federal Trade Commission*, 296 F.2d 800, 817 (9th Cir. 1961), *cert. den.*, 370 U.S. 937 (1962).

American Crystal Sugar Co. v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D.N.Y. 1957), *affirmed*, 259 F.2d 524 (2d Cir. 1958).

United States v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 599-603 (S.D.N.Y. 1960).

5. The reasonably probable effect of the acquisition by defendant Jos. Schlitz Brewing Company of stock of John Labatt Limited (and thereby control of General Brewing Company) will be substantially to lessen competition and

to tend to create a monopoly in the production and sale of beer in the United States as a whole, the Eight Western States, the State of California, and the State of Hawaii.

United States v. *Aluminum Co. of America,* 377 U.S. 271 (1964).

United States v. *Continental Can Co.,* 378 U.S. 441 (1964).

United States v. *Penn-Olin Chemical Co.,* 378 U.S. 158 (1964).

United States v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964).

United States v. *The Philadelphia National Bank,* 374 U.S. 321 (1963).

Brown Shoe Co. v. *United States,* 370 U.S. 294 (1962).

American Crystal Sugar Co. v. *Cuban-American Sugar Co.,* 152 F. Supp. 387 (S.D.N.Y. 1957), *affirmed,* 259 F.2d 524 (2d Cir. 1958).

United States v. *Bethlehem Steel Corp.;* 168 F. Supp. 576 (S.D.N.Y. 1960).

6. John Labatt Limited is a corporation engaged in commerce within the meaning of Section 7 of the Clayton Act.

Clayton Act, Section 1, 38 Stat. 730 (15 U.S.C. §12).

7. The acquisition of a stock interest in John Labatt Limited by defendant Schlitz is not an investment exempt from the prohibition of Section 7 of the Clayton Act.

Hamilton Watch Co. v. *Benrus Watch Co.,* 114 F. Supp. 307, 316 (D. Conn. 1953), *affirmed,* 206 F.2d 738 (2d Cir.).

8. The Department of Justice may challenge the acquisition of Burgermeister Brewing Corporation by defendant

Schlitz in this proceeding and is not estopped or restrained from doing so by its failure to bring suit at the time of the acquisition.

United States v. *New Orleans Chapter, Associated General Contractors of America, Inc.*, 382 U.S. 17 (1965), *reversing* 238 F. Supp. 273 (E.D.La. 1964).

United States v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 226 (1940).

United States v. *Grinnel Corporation*, 30 F.R.D. 358, 363 (D. R.I. 1962).

9. At the time of its acquisition by defendant Schlitz, Burgermeister Brewing Corporation was not a failing firm.

International Shoe Co. v. *Federal Trade Commission*, 280 U.S. 291, 301-02 (1929),

Erie Sand and Gravel Company v. *Federal Trade Commission*, 291 F.2d 279, 280-81 (3rd Cir. 1961).

10. The acquisition of all of the assets, except cash, of the Burgermeister Brewing Corporation by defendant Schlitz had, and continues to have, the reasonably probable effect of substantially lessening competition and tending to create a monopoly in the production and sale of beer in the Eight Western States area and in the State of California. Such lessening of competition was and is actual competition in the State of California and primarily potential competition in the Eight Western States area.

United States v. *Aluminum Co. of America*, 377 U.S. 271 (1964).

United States v. *Continental Can Co.*, 378 U.S. 441 (1964).

United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

United States v. *The Philadelphia National Bank*, 374 U.S. 321 (1963).

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962).

American Crystal Sugar Co. v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *affirmed*, 259 F.2d 524 (2d Cir. 1958).

United States v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1960).

11. The acquisition of the assets, except cash, of the Burgermeister Brewing Corporation by defendant Jos. Schlitz Brewing Company, as charged in the complaint herein, violated Section 7 of the Clayton Act.

12. The acquisition of stock of John Labatt Limited by defendant Jos. Schlitz Brewing Company, as charged in the complaint herein, violated Section 7 of the Clayton Act.

13. The relief necessary to accomplish the alleviation of the unlawful effects of the violations found herein will be the divestiture by defendant Schlitz of the assets of Burgermeister Brewing Corporation and of the stock of John Labatt Limited.

14. Such relief will require appropriate exercise of the injunctive power of this court upon defendant Jos. Schlitz Brewing Company and defendant General Brewing Company.

COMMENTS ON THE FINDINGS OF FACT PROPOSED BY DEFENDANT JOS. SCHLITZ BREWING CO.

The proposed Findings of Fact submitted by the defendant Schlitz were closely examined and carefully considered by the trial court. In the main, Schlitz' Findings have been rejected, because in their most important aspects, they are not supported by the evidence. No attempt is here made to detail the reasons for this conclusion as to each and every Finding of Fact proposed by Schlitz. Instead, the following comments serve to point out the major areas of disagreement between the court's view of the evidence and of the applicable law as contrasted to those urged by defendant Schlitz.

The Relevant Line of Commerce

Schlitz maintains that premium and non-premium beer constitute separate lines of commerce within the meaning of Section 7 of the Clayton Act. This conclusion is grounded largely on the assumptions that there is a clear price differential between premium and non-premium beer and that sales of premium beer have held a constant 20% of the national beer market.

Insofar as Schlitz' conclusion is based on a price differential between premium and non-premium beer, it is not supported by the evidence nor by the applicable case law. The trial court has found that in California, beer prices range over a wide spectrum from $.79 to $1.44 a six-pack. There is no rational way of choosing a point along this price spectrum and saying that all beer which sells above that point constitutes a line of commerce, or even a submarket, apart from all beer which sells below that point. This is precisely what the Supreme Court refused to do in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325-26 (1962), when it rejected the defendant's position that

medium-price and low-price shoes constituted separate lines of commerce for purposes of Section 7. In fact, an examination of the criteria listed by the Supreme Court in *Brown Shoe* and the evidence adduced here on the issue of the relevant line of commerce shows that each and every factor mentioned in the Supreme Court's opinion points toward a finding that all beer is the only relevant line of commerce in the present case.[3]

This conclusion is not vitiated by a showing that some percentage of beer consumers will purchase only premium, or only non-premium beer. Even Schlitz admits that there is "an area in which consumers cross over from premium to non-premium beers." (Schlitz Proposed Finding of Fact No. 132). This conclusion was expressed almost unanimously by the witnesses from the brewing industry. In *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964), the Supreme Court held that the government could establish that metal and glass containers constituted a single line of commerce without proving that the area of competitive overlap between them was complete. The Court said:

> "There may be some end uses for which glass and metal do not and could not compete, but complete inter-industry competitive overlap need not be shown. We

3. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes. . . . The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U.S. at 325.

> would not be true to the purpose of the Clayton Act's line of commerce concept as a framework within which to measure the effect of mergers on competition were we to hold that the existence of noncompetitive segments within a proposed market area precludes its being treated as a line of commerce." 378 U.S. at 457.

Clearly, there is at least as great a "competitive overlap" between premium and non-premium beers as between metal and glass containers. Furthermore, the testimony establishes conclusively that this competition for the beer consumers' dollar is reflected in competition among *all* beers for shelf space, servicing at retail outlets and point-of-sale advertising space.

The Relevant Section of the Country

Schlitz insists that the entire United States is the only relevant section of the country in this case. It contends that to quench their thirst, consumers can and do turn to brewers located anywhere in the nation. However, Schlitz seems to overlook the fact that only three brewers—Schlitz, Miller and Anheuser-Busch—actually compete on a national basis. The competitive "mix" of suppliers in the beer industry in any area or section of the country is composed of the three national brewers and a group of local and regional brewers. The evidence in this case shows that freight rates and population density and growth are among the most important factors relied upon by local and regional brewers in determining their geographic markets. Freight rates for shipping beer across the Continental Divide strongly support the conclusion that the Eight Western States area is a relevant section of the country; the population density and growth of California strongly supports the conclusion that it is a relevant section of the

country. Furthermore, both of the acquired American breweries made at least 90% of their sales in California or in the Eight Western States area.

In much quoted language in its *Brown Shoe* decision, the Supreme Court said that "the geographic market must . . . both 'correspond to the commercial realities' of the industry and be economically significant." 370 U.S. at 336-37. An examination of the brewing industry in general and of the competitors involved here in particular, shows that the trial court's Findings on the relevant sections of the country are completely consistent with the *Brown Shoe* test.

To support its position that the entire United States is the only relevant section of the country, Schlitz points out that the Miller Brewing Co. has only one brewery—in Milwaukee, Wisconsin—and that Miller competes successfully west of the Continental Divide. However, it was established at the trial that Miller sold its beer in California at a price considerably above that of the other "national premiums," Schlitz and Budweiser. It seems clear that Miller would be an even stronger competitor in the West if it could move its beer into western outlets at a lower cost for freight. Apparently, Miller feels this way also, since it has now made a firm offer to purchase General Brewing's Azusa brewery in Southern California.

The Probable Effect on Competition of Schlitz' Acquisition of Labatt and General Brewing

The record supports Schlitz' contention that Labatt is not now a substantial competitor in the United States. However, Schlitz goes further and states that "there is no evidence that Labatt plans to expand its efforts in the United States." (Schlitz Proposed Finding No. 61). This statement is patently erroneous. Both Mr. John H. Moore, President

of John Labatt, Ltd., and Mr. John B. Cronyn, Executive Vice President of John Labatt, Ltd., testified that Labatt did desire and intend to expand its operations into the United States markets and that it intended to use General Brewing as a vehicle for accomplishing this purpose. (Tr. 780, line 13—782, line 13; Tr. 632, line 19—633, line 11; Tr. 635, lines 5-13). The evidence clearly demonstrates that Labatt had the desire, the intention and the resourcefulness to enter the United States markets and to make General Brewing a stronger competitor in those markets.

Schlitz makes much of Labatt's early setbacks in entering the United States markets through its licensing agreement with General Brewing. In *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), the Supreme Court held that the acquisition of Pacific Northwest Pipeline Corp. by El Paso violated Section 7 of the Clayton Act because Pacific Northwest was a strong *potential competitor* in the California market. The Court pointed out that Pacific Northwest had the desire and the ability to enter this market. El Paso argued that Pacific Northwest had already tried to sell gas in California but had failed. The Court rejected this argument, saying:

> "That might be weighty if a market presently saturated showed signs of petering out. But it is irrelevant in a market like California where incremental needs are booming." 376 U.S. at 660.

It is appropriate to point out that the evidence in the present case shows that California's demand for beer is booming almost as quickly as its demand for gas. Like Pacific Northwest, Labatt is anxious and able to help meet the demand.

Schlitz' position in regard to General Brewing is that Schlitz never wanted control of General Brewing and that Schlitz would use its power as controlling stockholder of Labatt to arrange for a sale of General Brewing. This argu-

ment, even if supported by the evidence, is irrelevant to the issue of whether Schlitz' acquisition of Labatt and General Brewing violated Section 7 of the Clayton Act. "[T]he test of a violation of §7 is whether, *at the time of suit,* there is a reasonable probability that the acquisition is likely to result in the condemned restraints." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957) (emphasis added). At the time of suit, Schlitz did in fact control General Brewing.

Furthermore, even if Schlitz' contention about its intentions vis-a-vis General Brewing is deemed relevant to the issue of the terms of the trial court's decree, the facts of the present case show that the ends of the Clayton Act will not be served by allowing Schlitz to keep Labatt and divest itself of General Brewing. Preliminarily, it should be pointed out that the trial court is not convinced that from the outset of its negotiations with Labatt, Schlitz had no desire to control General Brewing. If this were true, Schlitz could have gone a great deal further in making sale of General Brewing a prerequisite for its purchase of Labatt stock. But, even accepting Schlitz' contention at face value, it is clear that Labatt ownership and support of General Brewing is most likely to maintain, and even increase, competition in United States brewing industry markets.

Entry into American brewing markets by new American firms is highly unlikely, and the large established Canadian brewers represent the most probable sources of potential substantial competition in the United States markets. But, if General Brewing were to be sold by Schlitz, the most likely buyer would be one of the larger American brewing firms. Both of the other large Canadian breweries already have an interest in an American brewing company, and Schlitz probably would not desire to increase the chances of

strong potential competition from Canada. The smaller American brewing companies, on the other hand, probably would not have the resources to purchase General Brewing and give it the necessary financial and technical help needed to reverse its present downward trend. The sale of General Brewing to one of the larger American breweries, or even to a Canadian brewery which already has a substantial interest in the United States brewing industry, might well create new antitrust problems and is, therefore, not at all desirable. See *United States* v. *E. I. du Pont de Nemours,* 366 U.S. 316, 333 (1961).

The Probable Effect on Competition of Schlitz' Acquisition of Burgermeister

Schlitz places great emphasis on what it describes as Burgermeister's deteriorating financial condition. (See, *e.g.,* Schlitz Proposed Findings 16-19, 28). However, the evidence conclusively establishes that Burgermeister was not a failing firm within the doctrine expounded by the Supreme Court in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291 (1930). Furthermore, as the trial court's Findings point out, Burgermeister had a modern plant, a healthy balance sheet and a strong group of beer wholesalers. Of course, it is true that Burgermeister's sales and profits were declining at the time of the Schlitz acquisition. However, this is undoubtedly true of many firms which decide to sell out to a competitor. Allowing an acquiring company to successfully raise the defense that its acquired former competitor showed declining sales and profits in the years immediately preceding the acquisition surely would provide an exception to Section 7 large enough to eviscerate the statute.

Schlitz asks the trial court to find that there is "no evidence that when a wholesaler adds a new brand to his line

he reduces his efforts on behalf of the other brands he is handling." (Schlitz Proposed Finding No. 46). This argument misses the point. It is clear that most brewers believe that a wholesaler needs a full price line of beers in order to compete most effectively. (Tr. 430, lines 17-22; Tr. 246, line 24—247, line 2; Tr. 303-304; Tr. 615, line 17—616, line 11). Furthermore, most brewers would like to have wholesalers who handle only their products, and there is a trend in this direction in the beer industry. (Tr. 245, lines 5-16; Tr. 1573-1574; Tr. 302, lines 5-16). When a brewer like Schlitz acquires a full price line of beers, it is in a position to select the most effective wholesalers of these beers and to require these wholesalers to carry the full line of Schlitz products. The evidence shows that the wholesalers selected by Schlitz will concentrate their efforts on Schlitz products, while those who have lost either Burgermeister, General Brewing's Lucky Lager, or Schlitz, will be less effective outlets for other brewers who do not market a full price line of beers. Schlitz carried out this process of selecting the most effective of the Schlitz or Burgermeister wholesalers after it acquired Burgermeister, and it is probable that Schlitz would do the same thing with the General Brewing wholesalers if it were allowed to control General Brewing. Schlitz' potential power in this important aspect of competition in the beer industry is somewhat analogous to the situation in the *Brown Shoe* case. There, in discussing the vertical anti-competitive effects of the Brown-Kinney merger, the Supreme Court noted:

> "[I]t is apparent both from past behavior of Brown and from the testimony of Brown's President, that Brown would use its ownership of Kinney to force Brown shoes into Kinney stores." 370 U.S. at 332.

The Court pointed out that one effect of the merger, therefore, would be to foreclose sections of the market to other shoe manufacturers who sold their shoes in Kinney stores.

Although Schlitz does not "own" the beer wholesalers who sold Burgermeister or who now sell Lucky Lager, it is clear that Schlitz could and did "force" its full line of products into some outlets and take its products away from other outlets. In either case, the wholesalers involved become less effective distributors for the products of other brewers. Thus, the Schlitz acquisitions of both American brewing companies have had and would continue to have serious anti-competitive consequences at the important wholesaler level in the beer industry.

The Court has prepared a Final Judgment and Decree consonant with all of the foregoing. A copy thereof appears as Appendix G.

Dated: March 24, 1966.

STANLEY A. WEIGEL
Judge

APPENDICES A THROUGH F OMITTED

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. **JOS. SCHLITZ BREWING COMPANY and GENERAL BREWING COMPANY,** Defendants.	**Civil Action No. 42127**

FINAL JUDGMENT AND DECREE

Plaintiff, United States of America, having filed its complaint herein on February 19, 1964, defendant Jos. Schlitz Brewing Company having appeared and filed its answer to the complaint denying the substantive allegations thereof, and defendant General Brewing Corporation, sued herein as General Brewing Company, having appeared and filed its answer thereto admitting the substantive allegations thereof, the testimony having been taken at the trial hereof, and the Court having fully considered the matter, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

(A) This Court has jurisdiction of the subject matter of this action and the parties hereto pursuant to Section 15 of the Act of Congress of October 15, 1914, as amended (15 U.S.C. Section 25).

(B) The acquisition by defendant Jos. Schlitz Brewing Company of the business and assets of Burgermeister

Brewing Corporation, as charged in the complaint herein, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. Section 18).

(C) The acquisition by said defendant of common capital stock in John Labatt Limited, as charged in the complaint herein, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. Section 18).

II

As used in this Final Judgment and Decree:

(A) "Person" means any individual, partnership, firm, corporation, association, trustee or other business or legal entity.

(B) "Schlitz" means defendant Jos. Schlitz Brewing Company, its successors and assigns.

(C) "General Brewing" means defendant General Brewing Company, its successors and assigns.

(D) "Burgermeister" means Burgermeister Brewing Corporation prior to December 31, 1961, a corporation organized and existing under the laws of the State of California.

(E) "Labatt" means John Labatt Limited, a Dominion Corporation, organized and existing under the laws of the Dominion of Canada, with its principal office in London, Ontario, Canada.

III

This Final Judgment and Decree is binding upon Schlitz and General Brewing, their respective subsidiaries, affiliates, directors, officers, agents and employees as well as upon all other persons who shall have received actual notice of this Final Judgment and Decree by personal service or otherwise.

IV

(A) Schlitz is permanently enjoined and restrained from acquiring, holding, or exercising any control over, directly or indirectly, any shares of stock of any corporation engaged in the brewing of beer in the State of California or any interest, directly or indirectly, in any brewery facility, plant or other assets of any person engaged in the brewing of beer in the State of California.

(B) For a period of ten (10) years from the date of entry of this Final Judgment and Decree, Schlitz is enjoined and restrained from acquiring, holding or exercising any control over, directly or indirectly, any shares of stock of any corporation engaged in the brewing of beer outside of the State of California or any interest in any brewery facility, plant or other asset of any person engaged in the brewing of beer outside of the State of California except (1) with the prior written consent of the plaintiff herein or (2) if such consent is refused or withheld, after approval by this Court upon an affirmative showing by Schlitz that the effect of the acquisition, holding or control will not be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country.

(C) For a period of five (5) years after the date of entry of this Final Judgment and Decree, General Brewing is enjoined and restrained from transferring any shares of stock in General Brewing owned by Labatt, Capital Estates, Inc., or Lucky Lager Breweries, Ltd., and from selling any brewing facility or plant owned by General Brewing at the time of entry of this Final Judgment and Decree except after delivery of written notice of any such proposed transfer or sale to the Assistant Attorney General in charge of the Antitrust Division at least sixty (60) days in advance of the intended effective date of each such transfer or sale.

V

(A) Schlitz shall, upon and subject to the terms of this Final Judgment and Decree, divest itself of all of the business and assets of Burgermeister acquired by Schlitz on or about December 31, 1961 and all additional assets or improvements which have since been added thereto by Schlitz (hereinafter all said business, assets, additions and improvements are collectively referred to as "the Burgermeister assets").

(B) (1) Schlitz is ordered and directed to make bona fide, persistent and sustained efforts to divest itself of the Burgermeister assets by sale, to publicize the availability thereof for sale in appropriate trade and financial publications and to promote the expeditious sale thereof. Sale shall be at a price and upon terms approved by this Court which will consider, among other things, the reasonable market value of the Burgermeister assets, the importance of effectuating a prompt sale and the desirability of sale as a going business to a purchaser who will use the Burgermeister assets as a viable competitor in the sale and production of beer.

(2) Schlitz shall render monthly written reports to this Court, with copies to the Assistant Attorney General in charge of the Antitrust Division, detailing its efforts to divest itself of the Burgermeister assets and the results of such efforts. Plaintiff or Schlitz may apply to this Court for approval or disapproval of any proposal for sale by Schlitz of the Burgermeister assets. All parties shall have the right to be heard thereon.

(C) (1) Schlitz shall take such steps as are necessary to maintain the Burgermeister assets until the time of sale thereof at the standard of operating performance applicable thereto during the year preceding entry of this Final Judgment and Decree. Pending such sale, Schlitz shall not

permit the Burgermeister brewery to be diminished in capacity nor turned to uses other than the production of beer. Schlitz shall furnish, to all bona fide prospective purchasers of the Burgermeister assets, information regarding said brewery and permit them to have such access to, and to make such inspection of, the Burgermeister assets and records as are reasonably appropriate.

(2) Schlitz is ordered and directed to continue to use and operate the Burgermeister assets until the time of sale thereof in substantially the same manner in which they have been used and operated during the year preceding entry of this Final Judgment and Decree and to continue the production, advertising and sale of Burgermeister beer in substantially the same manner that such production, advertising and sale has been carried on during that year. Schlitz is ordered and directed to continue to offer to sell Burgermeister beer to the distributors who at the time of entry of this Final Judgment and Decree distribute Burgermeister beer, and to use its best efforts to retain for the purchaser of the Burgermeister assets those distributors presently selling Burgermeister beer.

(3) Schlitz shall not increase its sales, if any, of Old Milwaukee beer to distributors who sell Burgermeister beer nor its advertising or promotion of Old Milwaukee beer, if any, for sale in States where Burgermeister beer is sold until six months after Schlitz has sold the Burgermeister assets as hereinabove required.

VI

Schlitz is ordered to divest itself, completely and unconditionally, of all of those shares of capital stock it holds in Labatt to a person or persons satisfactory to the Court. Within ninety (90) days after the date of entry of this Final Judgment and Decree, Schlitz is ordered to submit to the Court (with copies to plaintiff and General Brewing)

a plan for the sale of said stock, setting forth to the extent then known all of the terms and conditions of sale and the identity of the proposed purchaser or purchasers. Pending the complete divestiture of said stock, Schlitz is enjoined and restrained from exercising any dominion or control over said stock, directly or indirectly.

VII

(A) For the purpose of securing compliance with this Final Judgment and Decree and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to defendants at their respective principal offices, be permitted (1) reasonable access during the office hours of defendants to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of defendants relating to any of the matters contained in this Final Judgment and Decree; (2) subject to the reasonable convenience of defendants, and without restraint or interference, to interview officers, directors, agents and employees of defendants regarding such matters. All those so interviewed may have their own counsel present during all such interviews and shall, prior to interview, be advised of this provision therefor.

(B) Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, said defendants shall submit such reports in writing with respect to the matters contained in this Final Judgment and Decree as may from time to time be necessary for its enforcement.

(C) No information obtained by the means permitted in this Section VII shall be divulged by any representative

of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment and Decree or as otherwise required by law.

VIII

This Court expressly retains full jurisdiction for the purpose of enabling any of the parties to this Final Judgment and Decree to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment and Decree or for the modification or termination of any of the provisions thereof or for modifications which, consistently with the purposes thereof, may better comport with sound business practices or for making different or additional provisions for the divestiture by Schlitz of the Burgermeister assets and the Labatt stock if such divestitures have not been completed with all reasonable dispatch or for modification or termination of any of the provisions thereof by this Court on its own motion, and for the enforcement of compliance therewith and punishment of violations thereof. The retention of jurisdiction herein provided for shall not be exercised to relieve Schlitz of its duty, under this Final Judgment and Decree, to divest itself of the Burgermeister assets and of its stock in Labatt. No person shall subvert any provision of this Final Judgment and Decree by indirection or otherwise.

IX

Plaintiff's costs shall be taxed against defendant Schlitz.

Dated: March 24, 1966.

STANLEY A. WEIGEL
Judge